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# REPORTS OF CASES

DECIDED IN THE

## COURT OF APPEALS

OF THE

## STATE OF NEW YORK

FROM AND INCLUDING DECISIONS OF OCTOBER 2, TO DECISIONS  
OF NOVEMBER 27, 1900,

WITH

## NOTES, REFERENCES AND INDEX

---

By EDWIN A. BEDELL,  
STATE REPORTER

---

VOLUME 164.

ALBANY  
JAMES B. LYON.  
1901.



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*Rec. Mar. 21, 1901.*



## JUDGES OF THE COURT OF APPEALS.

---

ALTON B. PARKER, CHIEF JUDGE.

JOHN C. GRAY,

DENIS O'BRIEN,

EDWARD T. BARTLETT,

ALBERT HAIGHT,

CELORA E. MARTIN,

IRVING G. VANN,

ASSOCIATE JUDGES.

JUDSON S. LANDON,

EDGAR M. CULLEN,

WILLIAM E. WERNER,

JUSTICES OF THE SUPREME COURT SERVING AS  
ASSOCIATE JUDGES.\*

---

\* Designated by the Governor January 1, 1900, under section 7 of article VI of the Constitution, as amended in 1899.



## ERRATA.

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In *Gleason v. The Peerless Manufacturing Co.* (Memoranda, 163 N. Y. 601), "motion for reargument granted" should read "motion for reargument denied, with ten dollars costs."





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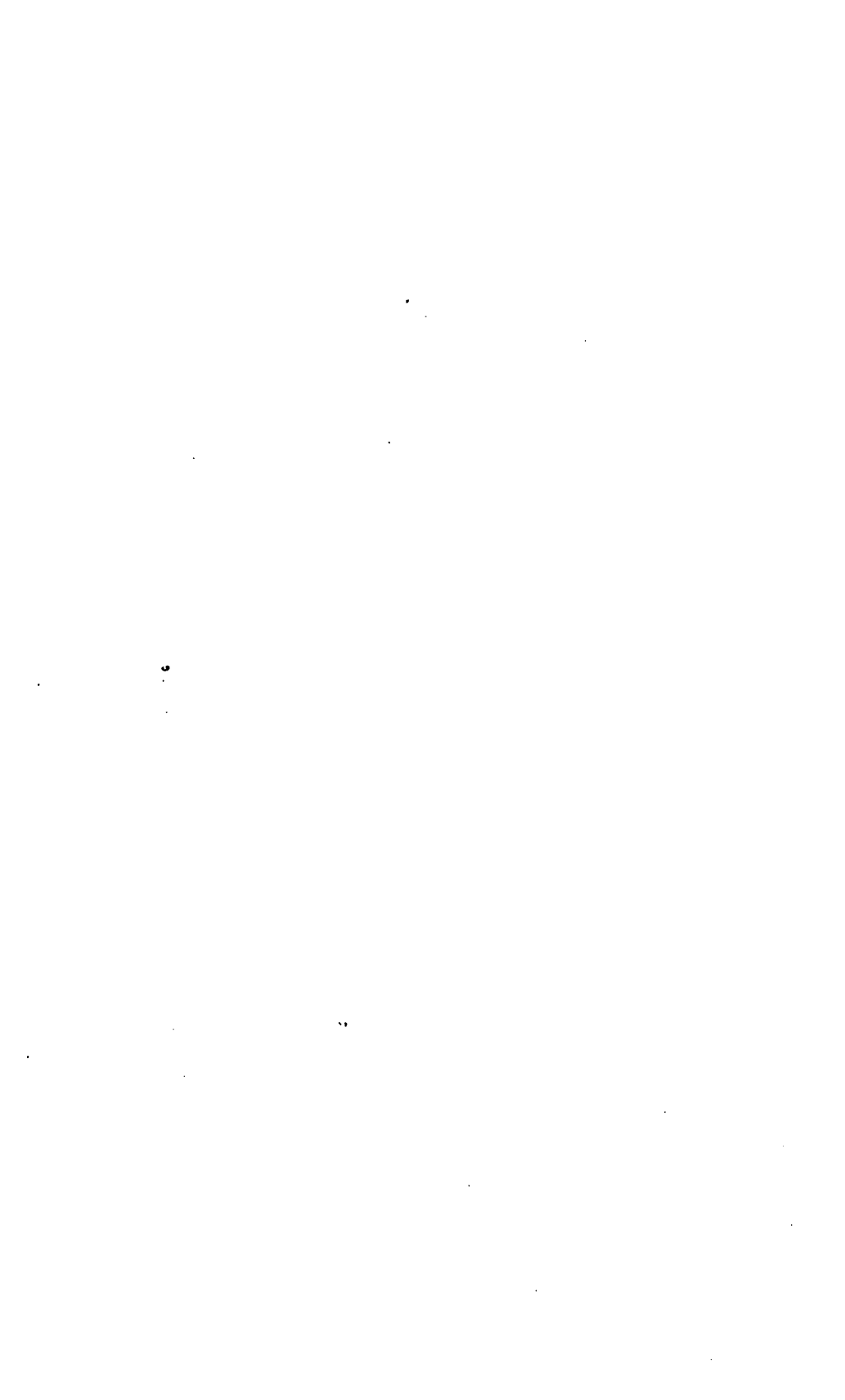
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# CASES DECIDED

IN THE

# COURT OF APPEALS

OF THE

## STATE OF NEW YORK,

COMMENCING OCTOBER 2, 1900.

ANDREW COSGRIFF et al., Respondents, v. WILLIAM DEWEY,  
Appellant.

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170	129

**TENANT IN COMMON — MUST ACCOUNT TO COTENANTS FOR ROCK QUARRIED AND SOLD.** A tenant in common in possession of land, who, without the consent or authority of his cotenants, quarries rock therefrom and crushes and sells the same and converts the proceeds to his own use, must account to his cotenants for the value of the rock taken from the premises, since such rock is a part of the freehold, and, to the extent it is taken, operates as a diminution of the estate.

*Cosgriff v. Dewey*, 21 App. Div. 129, affirmed.

(Argued May 18, 1900; decided October 2, 1900.)

**APPEAL** from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 25, 1897, modifying and affirming as modified a judgment in favor of plaintiffs entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Arthur S. Tompkins* for appellant. A tenant in common is not liable for rent or for the use and occupation or mesne profits of premises in the absence of an agreement to pay rent on an ouster of the cotenants by the one in possession. (*Kline v. Jacobs*, 68 Penn. St. 37; *Dresser v. Dresser*, 40 Barb. 300; 6 Lawson's Rights, Rem. & Pr. 4444; *Pico v.*

*Columbet*, 12 Cal. 414; *Everett v. Beach*, 31 Mich. 136; *Crow v. Mark*, 52 Ill. 332; *Chambers v. Chambers*, 3 Hawks, 232; *Woolever v. Knapp*, 18 Barb. 265; *Roseboom v. Roseboom*, 15 Hun, 309; *Zapp v. Miller*, 109 N. Y. 51.) In the absence of waste mesne profits cannot be recovered by a tenant in common against his cotenant unless the defendant was in wrongful possession. (15 Am. & Eng. Ency. of Law [1st ed.], 386; *Wallace v. Berdell*, 101 N. Y. 13.) The defendant did not use or occupy more than his proportionate share of the premises; hence an action does not lie for use and occupation, or for mesne profits. (*Joslyn v. Joslyn*, 9 Hun, 388.)

*Irving Brown* for respondents. The plaintiffs are clearly entitled to maintain this action. (*McCabe v. McCabe*, 18 Hun, 153; *Abbey v. Wheeler*, 85 Hun, 230; *Muldowney v. M. & E. R. R. Co.*, 42 Hun, 444; *Scott v. Guernsey*, 48 N. Y. 106; *Cosgriff v. Foss*, 152 N. Y. 105.)

O'BRIEN, J. The parties to this action are tenants in common of a tract of mountainous land, the principal value of which consists of deposits of trap rock which is useful when manufactured into crushed stone.

The plaintiffs' interest is nine-sixteenths and the defendant's seven-sixteenths. From the pleadings and findings in the case it appears that the defendant was the tenant in possession, and that, without the consent or authority of the plaintiffs, his cotenants, he quarried large quantities of the trap rock, crushed the same and sold it at a large profit, without accounting to the plaintiffs for any part of the same. The purpose of the action was to compel such accounting and to procure a judgment against the defendant for the value of the stone removed from the land, beyond that proportion of the same that belonged to the defendant as one of the owners in common.

The trial court held that the plaintiffs were entitled to maintain the action, and a reference was ordered for the pur-



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pose of ascertaining the value of the property taken by the defendant from the land and stating the account between the parties.

In the condition in which the record comes here the only question of law presented is the right of the plaintiffs to maintain the action. Of course it is well understood that one tenant in common, in possession of the entire estate, is not liable to his cotenants for the use of the common property, or to account to them for rents and profits, and if this case is governed by that rule the judgment in favor of the plaintiffs is manifestly erroneous. But it is equally clear that one tenant in common may maintain an action against his cotenant in possession for waste (Code, § 1656), or for damages for a sale or conversion of the joint property, if it be personal. (*Davis v. Lottich*, 46 N. Y. 393.) The term *waste*, when applied to a tenant in common, for life or for years, has a very extensive meaning. It includes the opening of new mines upon the land to procure and carry away metals, coal, gravel, stone or the like. So taking away the soil is waste, even though the purpose is to convert it into bricks for sale, and it has been held that a tenant in common who quarries stone from the common property is guilty of waste. So, also, is the taking of petroleum by one of the joint owners from the common property. Waste need not consist of loss of market value. It may be an actionable injury in the sense of destroying identity. The cases and authorities on this subject will be found collected in a recent work. (Rawle's *Bouv. Law Dic.* vol. 2, p. 1216.)

The stone which the defendant quarried and converted to his own use was a part of the freehold and, therefore, was the common property of all. It was not, in any proper sense, the product of the land, but was part of the land itself. It did not represent the use of the land or the rents and profits, but to the extent that it was taken by the defendant operated as a diminution of the estate. If the defendant had taken valuable timber from the land and sold it or converted it into lumber, there is no doubt, we think, that he would be liable

to account for its value to his cotenants. The act of taking timber and the act of taking stone, whether it be trap rock or marble, cannot be differentiated so far as the question of waste is concerned. Whether the stone which the defendant quarried upon the land and converted to his own use be considered personal property or part of the realty, he was bound to account to his cotenants for their proportion of its value. (*Knobe v. Nunn*, 151 N. Y. 506; *McCabe v. McCabe*, 18 Hun, 153.)

We think that the judgment must be affirmed, with costs.

PARKER, Ch. J., GRAY, HAIGHT, MARTIN, LANDON and WERNER, JJ., concur.

Judgment affirmed.

THOMAS C. HIGGINS, Appellant, v. GERTRUDE S. SHARP,  
Otherwise Called GERTRUDE S. HIGGINS, Respondent.

ACTION TO ANNUL A MARRIAGE—POWER OF SUPREME COURT TO GRANT ALIMONY AND COUNSEL FEES. The Supreme Court, in an action against a wife to annul a ceremonial marriage, has, in a proper case, as an incident to its jurisdiction to entertain the action, power to grant alimony and counsel fees *pendente lite*, although the provisions of the Code of Civil Procedure (§§ 1742 *et seq.*) authorizing and regulating actions to annul a marriage are silent as to alimony and counsel fees.

*Higgins v. Sharp*, 51 App. Div. 611, affirmed.

(Argued June 6, 1900; decided October 2, 1900.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, made April 14, 1900, affirming an order of Special Term awarding to defendant a counsel fee and alimony *pendente lite*.

The nature of the proceeding, the question certified and the facts, so far as material, are stated in the opinion.

*Edward W. S. Johnston* for appellant. No authority is to be found in the statutes of this state justifying the court in an action for annulment of a marriage awarding alimony and coun-

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sel fees *pendente lite*. (Code Civ. Pro. § 1769.) The court has no inherent power to award alimony and counsel fees in an action for annulment of a marriage. (*Bartlett v. Bartlett*, Clarke's Ch. 322; *North v. North*, 1 Barb. Ch. 241; *Meo v. Meo*, 18 N. Y. S. R. 270; *Lee v. Lee*, 4 Civ. Pro. Rep. 321; *Blinks v. Blinks*, 5 Misc. Rep. 193; *Ramsden v. Ramsden*, 28 Hun, 285; *Bloodgood v. Bloodgood*, 59 How. Pr. 42; *Griffin v. Griffin*, 47 N. Y. 134; *Peugnet v. Phelps*, 48 Barb. 566; *Erchenbrach v. Erchenbrach*, 96 N. Y. 456.) The court cannot award alimony and counsel fees *pendente lite* where the woman in her answer only denies knowledge or information sufficient to form a belief as to whether her admitted representations of inducement were false and nowhere asserts the validity of the marriage, and in response to her petition for such alimony and counsel fees the man produces indisputable and undisputed proof that at the time of such marriage ceremony she was the wife of another man. (*McGown v. McGown*, 19 App. Div. 368; *Bell v. Bell*, 4 App. Div. 527; *Matter of Kimball*, 18 App. Div. 320; *Davis v. Davis*, 2 Misc. Rep. 549; *Hamilton v. Hamilton*, 26 Misc. Rep. 336; *Forrest v. Forrest*, 2 Edm. Sel. Cas. 180; *Matter of House*, 40 N. Y. S. R. 286; *People v. Baker*, 76 N. Y. 78; *O'Dea v. O'Dea*, 101 N. Y. 23; *Cross v. Cross*, 108 N. Y. 628.)

*A. E. Lamb* for respondent. The Supreme Court has power to grant a wife alimony and counsel fee in an action to annul her marriage as an incident to its jurisdiction to entertain such an action. (*North v. North*, 1 Barb. Ch. 241; *Griffin v. Griffin*, 47 N. Y. 134.) The power possessed and exercised by the Supreme Court as successor of the Court of Chancery was not abridged by section 1769 of the Code of Civil Procedure. (*O'Dea v. O'Dea*, 31 Hun, 441; *Lee v. Lee*, 4 Civ. Pro. Rep. 312; *Isaacson v. Isaacson*, 3 Law Bul. 73; *Davis v. Davis*, 75 N. Y. 221.)

O'BRIEN, J. The order from which this appeal was taken awarded to the defendant counsel fee and a weekly allowance

as alimony during the pendency of the action. The action was brought by the plaintiff to annul a ceremonial marriage with the defendant, entered into in this state on the 19th day of June, 1894.

It appears from the pleadings and papers used upon the application in which the order was made that the defendant was married in the state of Ohio in December, 1888, to one Frederick H. Sharp; that in 1891 she instituted an action against him in the Court of Common Pleas of that state for an absolute divorce. The summons in the action was served upon the husband by publication and by mail at Brooklyn in this state where, it seems, he then resided or was found. In May, 1892, the court entered a decree dissolving the marriage, and it seems to be conceded that this judgment was authorized by the laws of that state and is there held to be valid. The defendant then married the plaintiff in this state as already stated.

The plaintiff now alleges that the defendant represented to him that she was legally divorced from her former husband, but that such representations were false and fraudulent, and made for the purpose of influencing him to contract the marriage in question; that, relying upon the truth of her representations, he did consent to the marriage and the ceremony was performed. These allegations were denied by the defendant in her verified answer, except the fact of the ceremonial marriage to the plaintiff, which she insists is valid. The defendant stated in her petition or application to the court, which was duly verified, that she was destitute of the means of support pending the action, or for carrying on her defense and defraying the costs and expenses attending the same. The plaintiff by his complaint, not only asks to annul the marriage, but to set aside and declare void the transfer of certain property to the defendant, made by him at the time.

It is somewhat difficult to say whether the basis of the action is fraud, or the incapacity of the defendant to contract the marriage by reason of the fact alleged that at the time of the ceremony the prior marriage to Sharp was in force. The

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complaint is silent as to some facts that would seem to be material, considering the peculiar form of the action. It is not stated when he discovered the fraud, or whether he cohabited with the defendant after the discovery, or whether the husband by the former marriage was alive at the commencement of the action. The issues made by the pleadings indicate that there are questions of importance in the case that must be tried and determined before the plaintiff will be entitled to judgment.

The order granting the allowance to the defendant was not appealable to this court as matter of right, but the court below has allowed an appeal and certified to us the following question which constitutes the basis of our jurisdiction: "And this court hereby certifies to the Court of Appeals that a question of law has arisen herein, which, in the opinion of this court, ought to be reviewed by the Court of Appeals, and that such question of law is: Has the Supreme Court in an action against a wife to annul a ceremonial marriage, in which action the wife by her answer only asserts the validity of the marriage, power to grant alimony and counsel fee *pendente lite*?"

We understand this question to involve only the power of the court, in an action to annul a marriage, to grant alimony and counsel fee pending the suit. If it calls for an opinion with respect to the mode of proving the necessary facts, or the degree of proof necessary in such cases, that is scarcely a question of law. All applications of this character made to the court should be considered with reference to what appears to be the merits of each case, and granted or denied in the exercise of a sound discretion. It is scarcely necessary to say that in an action against a woman to annul a marriage alleged to be void from the beginning, it should appear that she is defending its validity in good faith upon some reasonable or substantial ground. The mode of proving the facts and the degree of proof that should be required, as well as the general merits of the application, are matters so largely in the discretion of the court of original jurisdiction that it is not

within the province of this court to prescribe any rule of practice to be observed. These remarks would seem to be unnecessary but for the elaborate discussion in the brief of the learned counsel for the appellant concerning the merits of this particular case, as disclosed by the moving papers, and the peculiar form of the question itself, which seems to apply to a case where "the wife by her answer only asserts the validity of the marriage."

We will, therefore, assume that the question to be decided is whether the court has power in an action against the woman to annul a marriage to grant alimony and counsel fee pending the action.

It is argued in support of the appeal that the court does not possess that power, and this argument is based largely upon the general proposition that the jurisdiction of the court in matrimonial cases is derived wholly from the statute, and since the statute does not in terms confer any power upon the court to grant alimony, or an allowance in actions to annul a marriage, the order in this case should be reversed. It must be admitted that the power conferred by section 1769 of the Code applies to actions for divorce or separation, properly so designated, and not to actions like this, where it is sought to procure a judgment declaring the marriage void *ab initio*. But it does not follow that because the statute which authorizes and regulates actions to annul a marriage is silent as to alimony or counsel fees the court is without power to allow either or both in a proper case. (Code, § 1742-1755.) The general jurisdiction conferred by the statute to entertain such actions carries with it, by implication, every incidental power necessary for its proper exercise. When a statute gives the court jurisdiction over a class of actions it is not necessary that all the powers of the court, or all the details of the procedure and practice, should be specially enumerated. For the purpose of administering justice in such cases the court may resort to general rules of practice and may make such orders in the case as justice requires, and may exercise such incidental powers as are usual or necessary in such cases. The

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power to allow alimony and counsel fees to the wife in order to enable her to live pending the action, and to present her defense, if she has one, must be regarded as incidental and necessary in all matrimonial actions. Without such power the rights of the woman, in many cases, could not be adequately protected.

It seems to us, therefore, that actions to annul a marriage are governed, with respect to alimony and counsel fees, by the same principles as all other actions for divorce. When the court was vested with jurisdiction in such cases, the incidental power to guard and protect the rights of the wife, which had always been regarded as a part of the jurisdiction, necessarily followed and attached, upon the plainest principles of reason and justice.

While it may be true that some conflict of opinion is to be found in the books on this question, we think it is settled by authority in this state in accordance with the views above stated. (*North v. North*, 1 Barb. Ch. 241; *Griffin v. Griffin*, 47 N. Y. 134, 136; *Brinkley v. Brinkley*, 50 N. Y. 184, 193; *O'Dea v. O'Dea*, 31 Hun, 441; *S. C.*, 101 N. Y. 23.) These cases decide that while the jurisdiction to entertain actions to annul a marriage is statutory, yet the practice of the former Court of Chancery and of the ecclesiastical courts in England to allow alimony and counsel fees in proper cases is one of the incidents which necessarily follow the jurisdiction, and the same power now exists in actions under the statute.

The case of *North v. North* (*supra*) was decided by the chancellor in 1845. The argument based upon the statutory jurisdiction of the court was as strong then as it is now, but the court asserted the power to grant alimony and an allowance upon a state of facts and a case that differ in no essential respect from the one at bar.

The case of *Griffin v. Griffin* (*supra*) was an action by the husband against the wife to annul a marriage upon the same ground as in this case. The wife succeeded in the action and the husband's complaint was dismissed. The court made an

order granting to her alimony and a counsel fee of \$1,500, and nearly \$1,000 more to the wife herself as expenses for the defense of the action, in excess of the taxable costs. It was conceded that there was no express authority in the statute for such an order, and that, if sustained, it would have to rest upon the incidental powers formerly vested in the Court of Chancery in such cases to which it was said the Supreme Court had succeeded. This court sustained the order upon those grounds, following and affirming the case of *North v. North*. There was no more authority in the terms of the statute for the order in that case than there is in this, but it was clearly demonstrated in the luminous opinion of Judge RAPALLO that in such cases the power existed independent of the statute.

This is a case where the defendant has put in issue all the material allegations of the complaint and where she stands to defend her rights as the plaintiff's wife. Her application was, therefore, addressed to the sound discretion of the court, and the order cannot be questioned for want of power in the court to make it.

The order should be affirmed, with costs, and the question certified answered in the affirmative.

PARKER, Ch. J., BARTLETT, HAIGHT, VANN, LANDON and CULLEN, JJ., concur.

Order affirmed.

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IN THE MATTER OF THE ELECTION OF DIRECTORS OF THE  
MUTUAL FIRE INSURANCE COMPANY OF ALBANY; JAMES B.  
LYON et al., Petitioners, Appellants, v. JOHN F. RATHBONE  
et al., Respondents.

MUTUAL FIRE INSURANCE COMPANY — CASH POLICYHOLDERS ENTITLED TO VOTE AT ELECTION OF DIRECTORS. Holders of policies in a mutual fire insurance company, organized under chapter 239 of the Laws of 1836, as amended by chapter 47 of the Laws of 1848, who have paid a certain definite sum of money in full for insurance therein, in lieu and in place of a premium note therefor, are as fully and effectively insured as those



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who have given a premium note for insurance and are members of the company and entitled to vote at any election of its directors equally with note policyholders.

*Matter of Mutual Fire Ins. Co.*, 51 App. Div. 163, modified.

Argued June 8, 1900; decided October 2, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May 15, 1900, reversing an order of Special Term which established the election of appellants, hereafter called the Lyon board, as directors of the Mutual Fire Insurance Company of Albany for the year 1900, and establishing the election of respondents, hereafter known as the Rathbone board, as directors of the company for that year.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

*Lewis E. Carr, Robert G. Scherer, J. Murray Downs and N. F. Towner* for appellants. The order of the Appellate Division is appealable and may be here reviewed. (Code Civ. Pro. §§ 190, 3333, 3334; *Matter of Argus Co.*, 138 N. Y. 557; *Matter of Taxpayers, etc.*, 157 N. Y. 78; *People ex rel. Feeney v. Bd. of Canvassers*, 156 N. Y. 43; *Peri v. N. Y. C. & H. R. R. Co.*, 152 N. Y. 521; *Matter of Talmage*, 160 N. Y. 512; *Moulton v. Cornish*, 138 N. Y. 133; *Matter of Hulbert Bros. & Co.*, 160 N. Y. 9.) The reversal of the Special Term order was not on the facts, and the review of the Appellate Division order here is not hampered or limited by that consideration. (*Wetmore v. Wetmore*, 162 N. Y. 503; *Pringle v. L. I. R. R. Co.*, 157 N. Y. 100; *Koehler v. Hughes*, 148 N. Y. 507; *Buell v. Van Camp*, 119 N. Y. 160; *Murphy v. Jack*, 142 N. Y. 215; *Tim v. Smith*, 93 N. Y. 91.) The order was not one resting in discretion, but was the determination of matters of legal right. (*Matter of Argus Co.*, 138 N. Y. 557; *Matter of U. Ins. Co.*, 22 Wend. 591; *Matter of P. P. Co.*, 36 How. Pr. 105.) Cash policyholders are members of this company and entitled, equally with note policyholders, to vote for directors of the

company. (*Mygatt v. N. Y. P. Ins. Co.*, 21 N. Y. 52; *White v. Havens*, 4 Abb. Ct. App. Dec. 582; *U. Ins. Co. v. Hoge*, 21 How. Pr. 35; *Raegener v. Willard*, 44 App. Div. 41; *Schimpf v. L. V. M. Ins. Co.*, 86 Penn. St. 373; *Spruance v. F. & M. Ins. Co.*, 9 Col. 73; *Rundell v. Keenan*, 79 Wis. 492; *Davis v. Parcher*, 82 Wis. 488.) The custom of the company does not control the statute or vary the rule applicable to such corporations. (*Kent v. Q. M. Co.*, 78 N. Y. 159; *Boardman v. L. S. & M. S. R. R. Co.*, 84 N. Y. 157; *Woodruff v. Merchants' Bank*, 25 Wend. 673; *Wadley v. Davis*, 63 Barb. 500; *Bowen v. Newell*, 8 N. Y. 190; *Wheeler v. Newbould*, 16 N. Y. 392; *Higgins v. Moore*, 34 N. Y. 417; *Colgate v. Penn. Co.*, 102 N. Y. 120; *Herman v. N. F. Ins. Co.*, 100 N. Y. 412; *Ransom v. Masten*, 4 N. Y. Supp. 781.) The Special Term had jurisdiction to establish the election. (*Matter of Argus Co.*, 138 N. Y. 557; *Matter of U. Ins. Co.*, 22 Wend. 591; *Vandenberg v. B. Ry. Co.*, 29 Hun, 348; *Matter of E. Ins. Co.*, 38 Barb. 297; *Matter of G. S. Co.*, 17 App. Div. 234; *Matter of S. L. S. Co.*, 44 N. J. L. 529; *Matter of C. M. Co.*, 51 N. J. L. 78.) Having the power to count the cash policy votes cast for the petitioners, it was the duty of the court to establish the election on that basis and declare the petitioners elected. (L. 1836, ch. 239; *Smith v. Procter*, 130 N. Y. 319; *Matter of U. Ins. Co.*, 22 Wend. 599; *Matter of P. P. Co.*, 36 How. Pr. 105; *Matter of R. T. F. Co.*, 15 App. Div. 530; *Lyon v. Richmond*, 2 Johns. Ch. 51; *Weed v. Weed*, 94 N. Y. 243.)

*Marcus T. Hun* and *Learned Hand* for respondents. The appeal from the order of reversal should be dismissed for lack of jurisdiction. (*H. R. T. Co. v. W. T. & R. R. Co.*, 121 N. Y. 397; *Caston v. Dupe*, 145 N. Y. 250; *Schneider v. City of Brooklyn*, 155 N. Y. 623; *People ex rel. v. Lord*, 157 N. Y. 408; *People ex rel. v. Maynard*, 160 N. Y. 453; *Matter of Baer*, 147 N. Y. 355; *White v. Benjamin*, 140 N. Y. 268; *People ex rel. v. Van Wyck*, 157 N. Y. 495; *People ex rel. v. Bd. of Education*, 158 N. Y. 125; *Matter of*

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*Hart*, 159 N. Y. 278.) The court at Special Term erred while counting the cash policy votes of those voting in favor of the petitioners, in not counting the cash policy votes of those voting in favor of the Rathbone board of directors. (*Morris v. Beves*, L. R. [1 Q. B. 1897] 456.) The order granted in this case at the Special Term was erroneous, even assuming that the court was correct in its decision, that the cash policyholders were entitled to vote at the election, and that the policyholders voting for the Rathbone ticket did not cast their cash votes. A new election should have been ordered. (*Matter of L. I. R. R. Co.*, 19 Wend. 37; *People v. Phillips*, 1 Den. 388; *State v. McDaniel*, 22 Ohio St. 369; *Strong v. Smith*, 15 Hun, 222; *People ex rel. v. Simonson*, 61 Hun, 388; *Cohen v. N. Y. M. Ins. Co.*, 50 N. Y. 610; *Greeff v. E. L. Assur. Society*, 160 N. Y. 19.) The cash policyholders had no right to vote. (L. 1836, ch. 239; L. 1836, ch. 41; *Mygatt v. N. Y. P. Ins. Co.*, 21 N. Y. 53; *Power v. Vil. of Athens*, 99 N. Y. 592; *Mayor, etc., v. Starin*, 106 N. Y. 1; *Matter of Breslin*, 45 Hun, 210; *Meriam v. Harsen*, 2 Barb. Ch. 232; *McKean v. Delancy*, 5 Cranch, 22; *Bank of Utica v. Mesereau*, 3 Barb. Ch. 528; *Fort v. Burch*, 6 Barb. 60; *People ex rel. v. Comrs. of Taxes*, 6 Hun, 109; *Easton v. Pickersgill*, 55 N. Y. 510.)

HAIGHT, J. This proceeding was instituted under section 27 of the General Corporation Law, 1892, chapter 687, which empowers the Supreme Court, upon the application of any person complaining of any election of any corporation, forthwith and in a summary way to hear the affidavits, proofs and allegations of the parties, or otherwise inquire into the matters or causes of complaint and establish the election, or order a new election, or make such order or give such relief as right and justice may require.

The annual election of directors of the company took place on the 22d day of January, 1900. At that election the inspectors reported that the Lyon board received 1,112 votes which were cast upon note policies, so called, and the Rath-

bone board received 1,347 votes upon like policies, and, there-upon, they declared the Rathbone board elected. It appeared, however, that 895 votes in favor of the Lyon board were tendered upon cash policies, which were rejected by the inspectors upon the ground that cash policyholders were not entitled to vote. The court at Special Term held that cash policyholders were entitled to vote, and that, consequently, the Lyon board received 2,007 votes, and, therefore, adjudged that board elected. The Appellate Division reversed the order of the Special Term, holding that if the cash policyholders were entitled to vote, then the persons voting for the Rathbone board, holding such policies, should also be counted, and that the number of such votes amounted to 720, which would still leave the Rathbone board in the majority, and, therefore, it declared that board elected. The first and the important question raised for our determination is whether the cash policyholders are entitled to vote.

The Mutual Fire Insurance Company of Albany was organized by chapter 239 of the Laws of 1836. That act named certain persons and declared them a corporation by the name stated, and then provided, by section 3, that "The corporation hereby created shall possess all the powers and privileges and be subjected to all the restrictions and limitations which are granted to, or imposed upon the Jefferson County Mutual Insurance Company by the act incorporating that company." (Chapter 41, Laws of 1836.) That act, among other things, provided that "all persons who shall hereinafter insure with the said corporation \* \* \* shall thereby *become members* thereof during the period they shall remain insured by said corporation and no longer." Other provisions of the act give the management of the affairs of the company to a board of directors, to be annually elected by *the members* of the company, each member having one vote for each hundred dollars insured in the company, and every person becoming a member by effecting insurance shall be required to deposit his promissory note with the company in such amount as the directors should determine, payable at any time when the

directors shall deem the same requisite, for the payment of losses sustained by fires, etc. The Mutual Fire Insurance Company of Albany, having been thus organized, commenced business and has ever since conducted an insurance business in the city of Albany under the provisions of its charter. In 1848, by chapter 47, its charter was amended so as to provide that it shall be lawful for any person applying for insurance in the company, at his election, to pay the company a certain definite sum of money in full for such insurance, which sum shall be in lieu and in place of a premium note, and such person shall not be liable to the company during the continuance of his policy beyond the amount thus paid. It was further provided that the money so paid to the company should be retained as a fund for the payment of losses and expenses which may happen; that it should be exhausted before resort should be had to an assessment upon the premium notes deposited with the company, and that such fund and premium notes should constitute the capital of the company for the payment of its losses and expenses. Under this amendment of the charter, the company continued business, issuing what is called cash and note policies at the election of the applicant, and has so continued business until the election in question.

It will be remembered that by the provisions of the original act of incorporation, all persons insuring in the company were made members of the corporation during the period that their insurance continued, and that all members of the corporation were entitled to vote at the election of the directors. The amendment in 1848 has not in any manner changed or modified these provisions. Prior to that amendment, policies could only be issued upon the receipt of premium notes, and after the amendment policies could be issued upon the payment of a gross sum in cash in lieu of the delivery of the premium notes at the election of the applicant. In other words, two kinds of insurance were provided for; one, by the delivery of a premium note, and the other by the payment of a gross sum in cash, the notes and the cash becoming

the capital of the company out of which the losses on the policies were to be paid. The holders of cash policies were persons insured in the company as fully and as effectively as persons who held note policies. They were persons insured by the corporation, and under the express provisions of the act were members of the corporation during the period for which they were insured; and as such it appears to us that they were entitled to vote at any election of the company. While the provisions of these acts may not have been considered by the courts as to this question, that of the General Insurance Law of 1849, chapter 308, has been considered in the case of *Mygatt v. New York Protection Insurance Company* (21 N. Y. 52). In that case, SELDEN, J., in delivering the opinion of the court, says: "Article 5, among other things, provides as follows: 'The directors shall be elected by the persons holding policies of insurance in this company, or their proxies, and one vote shall be allowed on every one hundred dollars insured;' thus, every person holding a policy issued by the company is made a member of the corporation and entitled to a vote therein, entirely irrespective of the question whether the premium upon such policy was paid in money or by a premium note." It is true that this position is combated in the dissenting opinion of DENIO, J., but the majority of the court was with SELDEN, and the decision in that case, we think, should be regarded as a controlling precedent in this. In *White v. Havens* (4 Abbott's Court of Appeals Decisions, 582) the decision in the *Mygatt* case was followed, WRIGHT, J., saying: "The cash policyholders were members of the corporation as much as were the holders of policies based on a premium note. They were contributors to a common fund as the capital of the company to meet losses that might occur. They paid their premium in cash instead of notes or promises to pay." And to the same effect is *The Union Insurance Company v. Hoge* (21 Howard [U. S.], 35). We, consequently, are of the opinion that those composing the Lyon board have the right to have the votes cast in their favor by the cash policyholders counted.

The Appellate Division, as we have seen, has reached the conclusion that, notwithstanding the counting of the votes upon cash policies in favor of the Lyon board, the Rathbone board was properly elected. This result is reached by adding to the votes cast for the Rathbone board 720 votes which might have been voted upon cash policies held by such voters. The Appellate Division appears to differ somewhat with the court at Special Term as to the facts in this regard. We have no jurisdiction to review controverted questions of fact. There is one, however, about which there is no controversy. There were no votes tendered for the Rathbone board on election day upon cash policies. It is doubtless true that the voters did not suppose they were entitled to vote upon such policies. In all of the elections that have preceded votes upon note policies only had been received. We, however, agree with the Appellate Division that it would be quite unjust and unfair to deprive these persons of their votes upon cash policies under the circumstances disclosed in this case. We are not, however, prepared to sustain the conclusion that they were entitled to 720 votes. It is said that Daniel Leonard was entitled to 262 cash votes. The affidavit supporting this claim was made by his son, in which he states that if cash votes can be counted, the number of votes which his father is entitled to cast, "either personally or as an officer of a corporation insuring in said company, is 262 cash votes." It will be observed that he does not state the number of votes that his father was entitled to cast personally. He does not state the number that he was entitled to cast as an officer of the corporation. The name of the corporation is not given or the office therein that was held by his father. We think this is too vague and indefinite to become the basis of a determination of so important a question of fact by an appellate court.

We have concluded that, under the circumstances presented by the record, the order of the Appellate Division should be modified by striking out that portion of the order which establishes the election of the Rathbone board, and that instead

thereof a new election should be ordered upon the statutory notice of thirty days, the notice to be given within ten days after the entry of this order, and, as so modified, the order of the Appellate Division should be affirmed, but without costs of this appeal to either party.

PARKER, Ch. J., O'BRIEN, BARTLETT, VANN, LONDON and CULLEN, JJ., concur.

Ordered accordingly.

In the Matter of the Application of FRANCIS A. BARRY et al., Appellants, to Compel the BOARD OF REGISTRY IN THE FIRST ELECTION DISTRICT OF THE SEVENTH WARD OF THE CITY OF YONKERS, Respondent, to Place their Names upon the Register of Electors in said District.

ELECTIONS — RESIDENCE OF VOTERS — SEMINARY STUDENTS. Under section 3 of article 2 of the Constitution of the state of New York, residence for the purpose of voting is neither gained nor lost by a sojourn in a seminary of learning, and the fact that a student enters a seminary to be educated for a certain calling, and to remain there after graduation until assigned to duty, instead of a fixed course of four years, as is usual in institutions of learning, does not entitle him to vote in the election district in which such seminary is situated.

(Submitted June 8, 1900; decided October 2, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered December 29, 1899, affirming an order of Special Term, denying the application of the petitioners to have their names added to the registry of electors in the first election district of the seventh ward of the city of Yonkers.

The facts, so far as material, are stated in the opinion.

*John F. Brennan* for appellants. The appellants are qualified electors of the first election district of the seventh ward of Yonkers, and as such entitled to registration. (Const. N. Y. art. 2, § 3; *Silvey v. Lindsay*, 107 N. Y. 61; *People v. Cady*, 143 N. Y. 106; *People ex rel. v. Holden*, 28 Cal. 124; *Dublin v. Anderson*, 38 Cal. 92; *Putnam v. Johns*, 10 *Mass.*



N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

488.) The status of those preparing for the priesthood as well as of those already ordained, is to be distinguished from that of the student of a seminary of learning. (*Hegeman v. Fox*, 31 Barb. 478; *Sanders v. Gatchell*, 76 Me. 165; *Dupuy v. Wurtz*, 53 N. Y. 568; *Ennis v. Smith*, 14 How. [U. S.] 423.)

*John C. Davies, Attorney-General*, for respondent. The appellants were clearly within the inhibition of article 2, section 3, of the Constitution. (*Matter of Goodman*, 146 N. Y. 284; *Matter of Garvey*, 147 N. Y. 117.) The question of acquiring a domicile is one largely of intent, and that these appellants never intended to acquire in the city of Yonkers a residence or domicile such as the Constitution contemplates and requires is clearly manifest. (*People v. Cady*, 143 N. Y. 100; *People v. Platt*, 117 N. Y. 160; *Dupuy v. Wurtz*, 53 N. Y. 560.)

BARTLETT, J. The petition in this case is made by some fifty-nine ecclesiastical students at St. Joseph's Seminary, an institution established and maintained for the purpose of educating young men for the Roman Catholic priesthood, which is located in the seventh ward of the city of Yonkers.

In October, 1899, the petitioners sought to register themselves as legal voters in the seventh ward, but registration was denied by the board of inspectors.

The facts in this case are undisputed and as follows:

—No person is allowed to enter or remain in this seminary as a student unless he intends in good faith to become a Roman Catholic priest, and renounces all other residences or homes save that of the seminary itself, and upon his admission to the priesthood he continues in the seminary until assigned elsewhere by his ecclesiastical superiors.

It is insisted by the appellants that this case is differentiated from the cases heretofore decided by this court in regard to students temporarily residing in colleges and seminaries of learning for a definite period of time pursuing a certain course of study.

We agree with the conclusion reached by the courts below that there is nothing in this case that takes it out of the general rule laid down by this court in a number of decisions. It does not change the situation that a student enters a seminary, to be educated for a certain calling, and to remain there after graduation until assigned to duty, instead of a fixed course of four years, as is usual in institutions of learning.

The Constitution of this state provides in part (Article 2, § 3) as follows: "For the purpose of voting, no person shall be deemed to have gained or lost a residence \* \* \* while a student of any seminary of learning. \* \* \*"

The plain reading of the Constitution is that a sojourn in a seminary of learning has no effect whatever, one way or the other, on the question of legal residence for the purpose of voting.

In *Matter of Goodman* (146 N. Y. 284) it was held that where a person residing in one election district of a city removes to, takes and occupies a room in a seminary of learning in another district as a student, and not permanently as a residence, he neither loses his former residence, nor gains a new residence in the seminary district by the removal, and is entitled to vote in the former district, not the latter.

Judge FINCH, in writing the opinion of the court, among other things, said: "This construction obeys literally the constitutional mandate, and does not necessarily disfranchise a single citizen. It merely recognizes and applies the admitted truth, acted upon at every election, that the voting residence may be in one place and the actual abode in another. Usually, perhaps always, the voting residence remains unchanged until a new residence is actually acquired, but there can be no such acquisition merely by an abode as a student in an institution of learning. Something else, beyond that fact and wholly independent of it, must occur to effect the change. The intention to change is not alone sufficient. It must exist, but must concur with and be manifested by resultant acts which are independent of the presence as a student in the new locality."

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This case was followed in *Matter of Garvey* (147 N. Y. 117, 119).

The case of *Silvey v. Lindsay* (107 N. Y. 55), while dealing with the Soldiers' Home at Bath, in this state, was decided under the same section of the Constitution now considered, which deals not only with institutions of learning, but also almshouses or other asylums where persons are supported at public expense. The court said: "The plaintiff's vote was rejected upon the sole ground that he was not a resident of Bath. \* \* \* His only intention in going to Bath was to be an inmate of the home, and it was only as such inmate that his residency was to be continued. He was not there as a citizen changing his residence, but as an object of well-bestowed and deserving charity. He continues there with the intention of making his residence in the institution, so long, he says, 'as I shall be permitted to remain an inmate.'"

This court held, notwithstanding the fact that his sojourn was indefinite, he could not acquire the right to vote by reason of his residence in the home.

A person who is a legally qualified voter may leave his home in any part of the state and enter an institution of learning as a student; by this act he does not lose his residence for the purpose of voting at the place from whence he came. The fact that he is enrolled as a student in an institution of learning has no effect whatever upon his residence for the purpose of voting; he could if he chose acquire a residence at the place where the seminary is located, but this would have to be established by acts entirely distinct from his residence therein. The mere intention to change his residence would not suffice.

In the case at bar no acts which are distinct and independent of the presence of the petitioners in St. Joseph's Seminary are disclosed.

The order appealed from should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, HAIGHT, VANN and LANDON, JJ., concur; CULLEN, J., not sitting.

Order affirmed.

PHILIPP A. STUBER, Respondent, v. BIRD S. COLER, as Comptroller of the City of New York, et al., Appellants.

1. NEW YORK CITY — JUSTICES TRANSFERRED TO MUNICIPAL COURT HAVE NO POWER TO APPOINT CLERKS THEREOF FOR FULL TERM. Justices of the inferior courts of the cities of New York and Brooklyn, in office January 1, 1898, who were transferred to the Municipal Court of the city of New York as justices thereof to serve out their unexpired terms, have no power to appoint clerks of that court for terms of six years conferred by the new charter (L. 1897, ch. 378, § 1373) upon justices "elected or appointed as hereinbefore provided," since the words "elected or appointed" refer only to justices to be elected or appointed after the charter went into effect.

2. POWER OF TRANSFERRED JUSTICES TO FILL VACANCIES IN OFFICE OF TRANSFERRED CLERKS. The transferred justices, having had power under the old system to supply themselves with clerks, may make appointments, not extending beyond their own official existence, to fill vacancies that may arise by reason of the death or resignation of clerks transferred with them from the inferior courts.

3. APPOINTMENT FOR FULL TERM TO FILL VACANCY CAUSED BY RESIGNATION OF TRANSFERRED CLERK. An appointment of a clerk of the Municipal Court of the city of New York for the third district of the borough of Brooklyn, purporting to be for the full term of six years, made, upon the resignation of the clerk transferred with him, within two days before the expiration of his term, by a justice who had been transferred from an inferior court of the city of Brooklyn, is not a valid and effective appointment for a full term of six years and is void since such justice was not a justice of the Municipal Court either by election or appointment and had no power to appoint a clerk except such as he possessed before the enactment of the charter.

*Stuber v. Coler*, 49 App. Div. 88, reversed.

(Argued June 5, 1900; decided October 2, 1900.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, entered April 6, 1900, affirming an order of Special Term continuing a temporary injunction restraining the comptroller of the city of New York from paying to the defendant Carpenter the salary of clerk of the Municipal Court of the city of New York for the third district of the borough of Brooklyn, and the defendant Lynch, as judge of that court, from certifying to any pay roll in favor of said Carpenter.

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N. Y. Rep.]      Opinion of the Court, per O'BRIEN, J.

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The nature of the proceeding, the question certified and the facts, so far as material, are stated in the opinion.

*John Whalen, Corporation Counsel* (*William J. Carr* and *Luke D. Stapleton* of counsel), for appellants. The appointment of the defendant Carpenter on January 1, 1900, was valid and effectual, and he is now the legal incumbent of the office. (L. 1897, ch. 378, § 1373; *People ex rel. v. Kilbourn*, 68 N. Y. 479; *People ex rel. v. Raymond*, 37 N. Y. 428; *People ex rel. v. Common Council*, 77 N. Y. 503.)

*Joseph A. Burr* for respondent. Between the 1st day of January, 1898, and the 31st day of December, 1899, Schnitzpan had power and authority to appoint a clerk of the Municipal Court whenever a vacancy in said office should exist. (L. 1897, ch. 378, §§ 1350, 1352, 1361, 1373; Const. N. Y. art. 10, § 2; *Matter of Goodwin*, 30 App. Div. 418.) The statute is explicit and only recognizes one term, and that is for six years from the date of appointment. (L. 1897, ch. 378, § 1373.) Where the statute specifies that the commencement of a term shall be the date of appointment, and the duration of a term a definite period from that date, a person chosen to fill a vacancy, however created, holds for a full term. (Throop on Public Officers, § 319; *People ex rel. v. Townsend*, 102 N. Y. 430; *People ex rel. v. McClave*, 99 N. Y. 83; *People ex rel. v. Breen*, 21 J. & S. 167; *People v. Keeler*, 17 N. Y. 371.)

O'BRIEN, J. This was an action by a taxpayer to enjoin the comptroller of the city of New York from paying to the defendant Carpenter the salary of clerk of the Municipal Court for the third district of Brooklyn, and the defendant Lynch, as judge of that court, from certifying to any pay roll in favor of said Carpenter as clerk, or from recognizing him as such clerk, or from refusing to recognize one Weiman as the duly appointed and qualified clerk of the court for that district. The defendant Carpenter is also enjoined from acting or attempting to act as clerk of the court, or receiving

any pay or compensation therefor. The injunction granted was continued after a hearing at the Special Term, and that order has been affirmed at the Appellate Division. An appeal has been allowed to this court from the order of affirmance, and a question of law certified.

It is quite apparent that the purpose of this action was to determine which of two persons was entitled to hold the office of clerk of the Municipal Court in the third district of Brooklyn. The parties and the courts below have evidently disregarded the form of the action, and in the aspect in which the case comes here we are not disposed to protract the controversy, since it is in the public interest that it should be settled in the most expeditious way. The court, however, is not to be understood as committing itself to the doctrine that a taxpayer's action in equity will lie for any such purpose.

Before stating the question involved in the appeal, and which the court below has sent here, it is necessary to understand the facts out of which the controversy has arisen. The inferior local courts in New York and Brooklyn, existing prior to the enactment of the present charter, were known in the former city as District Courts, and in the latter as Justices' Courts. By the provisions of the new charter these courts were continued, consolidated and reorganized under the name of the "Municipal Court of the City of New York." (§ 1351.) This was not a new court, but the result of the reorganization and consolidation of certain inferior courts previously existing. When the two cities were united under the same municipal government, it became necessary to make such changes in the jurisdiction and organization of the inferior local courts as to produce something like uniformity. The plan outlined in the new charter for that purpose, briefly stated, is as follows: (1) The justices of the District Courts in the city of New York and the justices of the peace of the first, second and third districts of Brooklyn, in office on January 1, 1898, were continued for the remainder of the term for which they were elected or appointed under the old system, and they were to serve out their then unexpired terms as justices of the Municipal

Court, with the same powers and jurisdiction and subject to all the duties prescribed in the new charter for justices of that court. (2) Their successors were to be elected by the electors of the district at a general election. (3) Seven additional justices were to be appointed by the mayor on or before January 20, 1898, to serve a short term, their successors to be elected for ten years, the mayor to fill vacancies until the next election. (§§ 1345-1357.) (4) The clerks of the court in each district were to be appointed by the justices therein who were *elected or appointed* as hereinbefore provided, and to hold office for the term of six years from the date of the appointment. (§ 1373.) (5) But by the last-named section the clerks of the District Court of New York and of the Justices' Courts in the first, second and third districts of Brooklyn in office on January 1, 1898, were continued in office until the expiration of their terms as clerks of the Municipal Court. (6) The justices *elected or appointed* pursuant to the act were to qualify by taking the oath of office.

It is important to observe here that the words "elected or appointed" in the several sections of the new charter referred to could have no application to the justices of the peace, or the justices of the District Courts within the enlarged territory, constituting the new city, who were in office before the new charter went into complete effect. They had not been either elected or appointed to the reorganized Municipal Court in any legal or proper sense. They had been elected or appointed to the office of justice of the District Court or as justices of the peace under the old system and transferred to the Municipal Court as justices thereof by operation of law to serve out their unexpired terms. They were not required to take the oath of office, since they had taken it before when they assumed office under the old municipal government. The statute found them in office and kept them there, but transferred them to duty in a court of the same character, which was a consolidation and reorganization of the old system, but it did not *appoint* them in any legal sense. The legislature has no power under the Constitution to appoint a

justice of an inferior local court by statute. They must either be elected by the people or appointed by some local authority. So we must conclude that the words "elected or appointed" refer to the justices of the court created after the act went into effect, and not to those who were transferred as acting justices by operation of law.

It is true that the statute says that the latter justices shall possess the same jurisdiction, power and authority as the former, but that provision obviously refers to their judicial powers and duties and has no reference to the power to appoint clerks. There was no necessity to confer upon them any power to make such an appointment, since, as we have seen, their clerks serving under the old system were transferred with them to serve until their terms expired.

But it is said that this construction would disable the justices so transferred from appointing a clerk to fill a vacancy caused by the death or resignation of one of the old clerks so transferred by the statute. If this objection had any real foundation it would simply amount to an omission on the part of the lawmakers and could not change the true meaning of the statute; but it has not, and the answer to it is quite plain. Whatever power they possessed and were vested with originally under the old system with respect to appointments to fill a vacancy in the office of clerk they retained and carried with them when transferred to new duties by the statute. While no new power in that respect was conferred upon them when transferred, it is equally clear that they were not shorn of any that they had before. The office which they held originally under the old system included the power to supply themselves with clerks, and that was not abolished by the new charter as to them. They could still do, during the remainder of their term, in that respect, whatever they could do before; that is to say, they could fill vacancies in the office of clerk, but such appointments could not extend beyond their own official existence. When a justice of the peace or of the District Court, vested with the power to appoint or remove his clerk at pleasure, was made a justice of the Municipal Court, by statute, to



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serve out his term, the same power with respect to his clerk followed the office, except in so far as it was expressly abolished by statute. It may be that under the new charter they could not remove the clerk as before, but, certainly, they could fill vacancies. So it is plain that the construction which, in my opinion, the statute should receive, does not in the least hamper or cripple any of the justices transferred from the old system with respect to appointing a clerk in case of a vacancy in that office. It simply denies to them the right to exercise the new power to appoint a clerk for the term of six years, and leaves to them every power that they possessed before.

This view of the statute law applicable to the question involved brings us to the facts of the case. One William Schnitzpan, before the enactment of the new charter, had been elected as a justice of the peace in the third district of Brooklyn for a term to expire on January 1, 1900, and was one of the justices transferred to the Municipal Court. His clerk, appointed when he was acting as a justice of the peace, was transferred with him by the statute and his term would expire at the same date as that of the justice by whom he was appointed. On the 29th of December, 1899, two days before the expiration of his term, the clerk resigned, and thereupon Schnitzpan, two days before his term expired, appointed Weiman clerk of the Municipal Court in the third district for six years.

The defendant Lynch was duly elected as a regular justice of the Municipal Court under the new charter at the election in November, 1899, for a full term to succeed Schnitzpan in the third district. He qualified and entered upon the duties of the office on the first of January, 1900, but then found that his predecessor had provided him with a clerk for six years, by an appointment made just before his term was about to expire, in the person of Weiman. The new justice refused to recognize the appointment and proceeded to appoint the defendant Carpenter as clerk of the Municipal Court in the third district for the full term of six years, and the latter qualified, but, as already stated, the order in this case enjoins

him from acting or receiving the salary, the justice from certifying to the pay roll and the comptroller from paying him.

The question certified to us by the court below is in the following words, the court having first allowed the appeal: "Upon the facts disclosed by the record in the present case was the appointment of Julius Weiman, made on the 28th of December, 1899, to be clerk of the Municipal Court of the City of New York for the Third District in the Borough of Brooklyn, a valid and effective appointment for the term of six years?" We think it was not a valid appointment for the reason that Schnitzpan had no power to make it. It is clear that the appointment of Carpenter made by the new justice must be valid, unless the prior appointment of Weiman, made under the circumstances stated, was a fatal obstacle in the way. But since Schnitzpan was not one of the justices empowered by the statute to appoint a clerk for six years his act was void and his appointee acquired no rights under it. The appointment was made by one who was not a justice of the Municipal Court, either by election or appointment, but who was simply serving out his unexpired term as justice of the peace under another name or title, but with no power of appointment except such as he possessed before the enactment of the charter. The new power to appoint a clerk with a term of six years was conferred only upon the regular justices of the Municipal Court elected or appointed by the mayor under the new charter. It was not conferred upon the justices of the peace or District Court justices transferred to duty in the court by the statute with their clerks for the unexpired portion of their term. That class of justices, of which Schnitzpan was one, had no power with respect to the appointment of clerks, except such as they possessed when they originally took office. When the clerk resigned a vacancy was created for two or three days, and the appointment may have operated to fill that vacancy, but nothing more.

This is so for another reason. The statute in providing that the clerks should hold office for six years from the date of the appointment was intended to designate the term and

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fix its duration. It applied to the first appointments under the charter and those following the expiration of each regular term of six years; but had no reference to vacancies during the term. That was left to be governed by the general law providing for appointments to fill vacancies in office and for the duration of such appointments. The Public Officers Law (Laws of 1892, ch. 681, § 27) is quite clear on this point and covers the case, since the charter contained no express provision for appointments to the office of clerk of the court where a vacancy occurred. "If an appointment of a person to fill a vacancy in an appointive office be made by the officer, or by the officers, body or board of officers, authorized to make appointment to the office for the full term, the person so appointed to such vacancy shall hold office for the balance of the unexpired term."

Those considerations are quite sufficient to dispose of this case. If it had been alleged and found that the act of Schnitzpan in making the appointment, as his own term was about to expire, was in bad faith, then it is possible that another principle which the courts have applied to the acts of public officers in similar cases would operate. (*Hendrickson v. City of New York*, 160 N. Y. 144; *Wait v. Ray*, 67 N. Y. 36; *Morrow v. Ostrander*, 13 Hun, 219.) But it is unnecessary to inquire how far, if at all, the doctrine of these cases applies to the act of a public officer in making an appointment to office.

The order appealed from should be reversed, with costs, the injunction order vacated and the question certified answered in the negative.

PARKER, Ch. J., BARTLETT, HAIGHT, VANN, LANDON and CULLEN, JJ., concur.

Order reversed, etc.

CONRAD WOLF, Respondent, v. THE AMERICAN TRACT SOCIETY,  
 Impleaded with JOHN DOWNEY et al., Appellants.

NEGLIGENCE—IDENTIFICATION OF WRONGDOER. Where, under the maxim *res ipsa loquitur*, injuries, caused by the falling of a brick from a building in process of construction on a public street by nineteen independent contractors employing about two hundred and fifty men, may be presumed to have been the result of negligence, but there is no proof whatever as to who set the brick in motion or from what part of the building it came, the presumption of negligence is not sufficient to sustain a recovery of damages against two of the contractors, one being in charge of the carpenter work and the other of the mason work, since the party responsible for the injury is not identified.

*Wolf v. Am. Tract Society*, 25 App. Div. 98, modified.

(Argued May 23, 1900; decided October 2, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered January 11, 1898, overruling plaintiff's exceptions to the dismissal of the complaint against the defendant, the American Tract Society, and sustaining plaintiff's exceptions to the dismissal of the complaint against the defendants John Downey, Louis Weber and Edward Weber, which exceptions had been ordered to be heard in the first instance by the Appellate Division, and directing judgment in favor of said defendant, the American Tract Society, and granting a new trial as to defendants John Downey, Louis Weber and Edward Weber.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Herbert C. Smyth* and *Edwin A. Jones* for appellants. The dismissal of the complaint was proper as to the defendant Downey, because he had not been in any way connected with the happening of the accident. (*Kelly v. Mayor, etc.*, 11 N. Y. 432; *Pack v. Mayor, etc.*, 8 N. Y. 222; *Charlock v. Freel*, 125 N. Y. 357; *Vogel v. Mayor, etc.*, 92 N. Y. 11; *Murray v. Usher*, 117 N. Y. 542; *Burns v. Pethcal*, 75 Hun, 437; *Smith's Law of Master & Servant*, 415; *Lane v. Cotton*,

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12 Mod. 488; *Perkins v. Smith*, 1 Wils. 328; *Bennett v. Bayes*, 5 H. & N. 391.) The complaint was properly dismissed as to the defendants L. and E. Weber, who were the mason contractors, because no negligence on their part was proven. (*Rupert v. B. H. R. R. Co.*, 154 N. Y. 90; *Laidlaw v. Sage*, 158 N. Y. 73; *Douglas v. R. R. Co.*, 41 App. Div. 615; *White v. A. R. Co.*, 35 App. Div. 23; *Gray v. M. S. R. Co.*, 39 App. Div. 536; *Wieland v. D. & H. C. Co.*, 42 App. Div. 627; *Searles v. M. R. Co.*, 101 N. Y. 661; *Baulec v. N. Y. & H. R. R. Co.*, 59 N. Y. 356; *Wall v. Jones*, 18 N. Y. Supp. 674; *Shields v. Robins*, 12 Misc. Rep. 332.)

*J. Culbert Palmer* for respondent. The plaintiff being properly upon a public street was free from contributory negligence. (*Dohn v. Dawson*, 90 Hun, 271; 157 N. Y. 686.) From the nature of the accident, the presumption of negligence follows, and throws upon those in control of the work the burden of showing the use of due care. (*Mullen v. St. John*, 57 N. Y. 571; *Hogan v. M. Ry. Co.*, 149 N. Y. 25; *Volkmar v. M. R. R. Co.*, 134 N. Y. 421.) If there is any evidence tending to show that any or all of these defendants were in charge of the work then in progress, it was error to dismiss the complaint as to such defendants. (*Clemence v. City of Auburn*, 66 N. Y. 338; *Guldseth v. Carlin*, 19 App. Div. 589; *Mullen v. St. John*, 57 N. Y. 571.) In addition to the liability of the defendants Weber for not taking proper precautions to protect passers-by, they are directly liable for the negligence of one of their employees in letting fall the brick which injured the plaintiff. (*Dohn v. Dawson*, 90 Hun, 271; 157 N. Y. 686; *Guldseth v. Carlin*, 19 App. Div. 589.) John Downey and the Webers are all liable, jointly and severally, in the absence of an explanation rebutting negligence. (*Slater v. Mersereau*, 64 N. Y. 138; *Merritt v. Fitzgibbon*, 29 Hun 634.)

O'BRIEN, J. The plaintiff's action for damages resulting from personal injuries was dismissed at the trial, but the court

below on appeal reversed this judgment as to all the defendants other than the Tract Society, and these defendants have appealed to this court from the judgment of reversal.

The facts established at the trial upon which the complaint was dismissed, briefly stated, were these: On the 25th of March, 1895, a large structural steel building, twenty-three stories in height, was in progress of construction by the American Tract Society near the corner of Nassau and Spruce streets in the city of New York. The society owned the building and had contracted for its erection with various contractors who agreed to do each a special part of the work. It was shown that there were nineteen independent contractors employing about two hundred and fifty men in all. These contracts were made directly with the Tract Society and bound the contractor in each case to do some particular part of the work, and in most, if not all of them, the contractor was bound to use due care and to indemnify the owner of the building against any loss resulting from injuries to others in the progress of the work.

The proof tended to show that on the day named the plaintiff was in the service of one of the contractors for furnishing the steam fitting for the building, and was sent there with a load of pipe upon a truck. The truck was stopped on the Spruce street side of the building, which is a narrow street. While the plaintiff was on the truck attending to his duties, and without any negligence on his part, a brick fell from the building, which had then reached the ninth story, and struck him upon the head, inflicting a very serious injury. There were then in the building, it seems, not only masons and carpenters engaged in the work, but steam fitters and plumbers putting in pipes in recesses in the walls, elevator men, electric light people and various workers doing work around the building. There was no proof whatever to show from what part of the building the brick came, or who dropped it or set it in motion. There was no proof to identify the person in or about the building as the immediate author of the wrong. Of all the numerous persons engaged in or about the work the

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jury could not have imputed the accident to any one of them more than another. In this state of the proof the trial judge dismissed the complaint. The learned Appellate Division sustained the trial judge so far as affected the Tract Society, the owner of the building; but since it appeared that the defendant Downey had charge of the carpenter work, and the defendants, the two Webers, had charge of the mason work, and that neither of them had shown conclusively that the brick was not set in motion by the act of some of their workmen, it was held that there was a case for the jury to find that some one of them, or all of them together, were chargeable with negligence and so responsible to the plaintiff for the injury.

We agree with the court below that this is a case where the maxim *res ipsa loquitur* applies. There is a presumption that the plaintiff's injury was the result of negligence. (*Mullen v. St. John*, 57 N. Y. 567; *Hogan v. Manhattan R. Co.*, 149 N. Y. 23; *Kearney v. London, etc., Ry. Co.*, L. R. [5 Q. B.] 411; *Volkmar v. Manhattan R. Co.*, 134 N. Y. 418.) But that presumption did not complete the proof which it was incumbent upon the plaintiff to make before the case could be submitted to the jury. In a case like this, where the building in process of construction is in charge of numerous contractors and their workmen, each independent of the other, and none of them subject to the control or direction of the other, some proof must be given to enable the jury to point out or identify the author of the wrong. There is no principle that I am aware of that would make all of the contractors, or all the workmen engaged in erecting this building, liable *in solido*. And yet there is just as much reason for that as there is for holding two of these contractors for no other reason than that one of them had charge of the carpenter work and the other of the mason work. The plaintiff, we must assume, suffered injury from the negligence of some one; but I am not aware of any ground, in reason or law, for imputing the wrong to the two contractors who are defendants, or for selecting them from all the others as responsible to the plaintiff, unless they can conclusively show that they

are not. When there is no proof where the brick came from, except that it came from the building, and nothing to identify the person who set it in motion, it cannot be said that the plaintiff has made out a case for the jury. The presumption does not go far enough, since the party chargeable with the act from which the injury resulted has not been identified, but that important fact is left entirely to conjecture. There is no principle of law that will permit the plaintiff to proceed upon the theory that any one in any way connected with the work, or any one or more of them that he chooses to select, must respond to him in damages for the injury. If the plaintiff was unable to give proof pointing to the party responsible for the injury, that is no reason why the innocent and the guilty should be held in a body upon a presumption that some or all were negligent.

Each of the nineteen contractors was responsible only for the negligence of his own servants or employees. He was not responsible for the negligence of the servants of the other contractors. The men employed in and about the building in the aggregate were the servants of nineteen different masters. As the person who caused the injury was not identified by the proof, it was of course impossible to identify the master responsible for his act. It follows that either the plaintiff's action must fail for want of proof, or we must hold, as the court below did, that any or all the contractors together may be held responsible for the injury. I am quite sure that such a proposition cannot be defended upon principle, and I am not aware of any authority that can possibly lend any support to it.

Cases must occasionally happen where the person really responsible for a personal injury cannot be identified or pointed out by proof, as in this case, and then it is far better and more consistent with reason and law that the injury should go without redress than that innocent persons should be held responsible upon some strained construction of the law developed for the occasion. The idea suggested in this case, that all or any of the nineteen contractors may be held



since the plaintiff is unable by proof to identify the real author of the wrong, is born of necessity, but embodies a principle so far-reaching and dangerous that it cannot receive the sanction of the courts.

The liability of the owner to the plaintiff upon the facts presented by the record in this case is not a practical question upon this appeal, since the plaintiff has not appealed from that part of the order of the court below which discharged the Tract Society from liability absolutely, and the plaintiff cannot maintain this action upon the promise or covenant of the contractors with the owner for the reason that he was not a party to that contract and it was not made for his benefit. (*Reynolds v. Van Beuren*, 155 N. Y. 120.)

The sole question now before us is whether there was any case made out against the two contractors who were originally joined as defendants with the owner of the building, and we are of opinion that there was not.

The order appealed from should be reversed as to them, and that of the trial court affirmed, with costs.

HAIGHT, J. (dissenting). The plaintiff was injured by a brick falling from a building twenty-three stories in height in process of construction, belonging to the defendant, the American Tract Society. The appellants, Downey, Louis and Edward Weber, with others, were contractors, each agreeing to do a special part of the work. The question presented by the record is as to whether the plaintiff can recover of any of the defendants without showing the particular person who dropped or caused the brick to fall.

It appears to be conceded that if the society was constructing the building itself, through its own servants, the law would presume negligence from the fact that the brick fell, and the society would be liable. It also appears to be well settled that where the owner contracts with an individual to construct a building, the owner surrendering to the contractor the possession, control and management of the property until the building is completed, the contractor and not the owner would

be presumed negligent for acts of this character, and, consequently, liable. But it is contended that because there are many contractors no presumption of negligence arises against any one, and, consequently, there is no liability unless the plaintiff can show who the particular individual was who dropped the brick.

Injuries of this character are not uncommon, but it is seldom that the injured party is able to show who the negligent person was, and if the principle contended for is to be sustained in its entirety, without limitation, the public has little protection from the dangers liable to occur from the construction of high buildings upon the lines of streets in our large and populous cities. A person, walking along a street who is suddenly crushed to the earth by a brick falling from a high building filled with workmen, has but slight opportunity to ascertain who the person was who caused the brick to fall, and such person seldom confesses to his misconduct. It was owing to this difficulty that the rule of presumption of negligence to which we have alluded was established. It was a rule founded upon necessity designed for the protection of the public, and, in my judgment, should not be abrogated because the owner sees fit to contract with two or more persons to construct his building.

While the liability of the owner is not now before us, it becomes important to understand the nature of his duties in order to determine whether the contractors are liable. The owner, if constructing the building himself, is liable for the negligent acts of his servants. He is also liable for a failure to discharge a duty which he owes to the public. In constructing high buildings, objects are liable to fall. A sudden gust of wind, or a slight accident may be sufficient to set in motion a stone, a brick, a board or an iron tool which might cause the death of a person passing along the sidewalk below. The owner is, therefore, charged with the duty of active vigilance to see that no harm is done to others. The nature and the amount of his vigilance depend largely upon the character and the extent of the dangers that he is required to guard

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against. In some instances he may be required to give notice of the danger by signs or barricades, and in others he may be required to erect covers over the sidewalks sufficiently strong to protect the people passing thereon from falling objects. When he has contracted to have the building constructed for him, ordinarily all of these duties devolve upon the contractor, but there are exceptions to this rule. A municipality charged with a duty by the statute of keeping its streets in a safe condition for travel cannot relieve itself from liability for damages occasioned by a person driving into an unguarded pit in the night time by contracting with an individual to construct a sewer or repave a street. (*Storrs v. City of Utica*, 17 N. Y. 104; *Brusso v. City of Buffalo*, 90 N. Y. 679; *Vogel v. Mayor, etc.*, 92 N. Y. 10.) Another exception includes contracts that are unlawful or which provide for acts which, when performed, will create a nuisance, and still another is where the thing contracted to be done is necessarily attended with danger or is intrinsically dangerous. ANDREWS, Ch. J., in delivering the opinion of the court in the case of *Engel v. Eureka Club* (137 N. Y. 100, 104), after stating the rule as to the liability of contractors, says: "There are well-understood exceptions to this rule of exemption. Cases of statutory duty imposed upon individuals or corporations; of contracts which are unlawful, or which provide for the doing of acts which, when performed, will create a nuisance, are exceptions. In cases of the first-mentioned class the power and duty imposed cannot be delegated so as to exempt the person who accepts the duty imposed from responsibility, and in those of the second class exemption from liability would be manifestly contrary to public policy, since it would shield the one who directed the commission of the wrong. (*Storrs v. City of Utica*, 17 N. Y. 104; *Lowell v. B. & L. R. R. Co.*, 23 Pick. 24; *Hole v. S. & S. Ry. Co.*, 6 H. & N. 488; *Butler v. Hunter*, 7 id. 826.) There are cases of still another class where the thing contracted to be done is necessarily attended with danger, however skillfully and carefully performed, or, in the lan-

guage of Judge DILLON, is 'intrinsically dangerous,' in which case it is held that the party who lets the contract to do the act cannot thereby escape from responsibility for any injury resulting from its execution, although the act to be performed may be lawful. (2 Dillon on Mun. Corp. § 1029, and cases cited.) But if the act to be done may be safely done in the exercise of due care, although in the absence of such care injurious consequences to third persons would be likely to result, then the contractor alone is liable, provided it was his duty under the contract to exercise such care. (*McCafferty v. S. D. & P. M. R. R. Co.*, 61 N. Y. 178; *Connors v. Hennessey*, 112 Mass. 96; *Butler v. Hunter*, *supra.*)" (See, also, *King v. N. Y. C. & H. R. R. R. Co.*, 66 N. Y. 181; *Burmeister v. N. Y. El. R. R. Co.*, 15 J. & S. 264; *O'Rourke v. Hart*, 7 Bosworth, 511; *Vanderpool v. Husson*, 28 Barbour, 196; *Gardner v. Bennett*, 6 J. & S. 197; *King v. Livermore*, 9 Hun, 298; *affd.*, 71 N. Y. 605; *Dohn v. Dawson*, 84 Hun, 110.)

It will be observed from an examination of the above cases that it is not every contract that relieves the owner from liability, or the duty of watching and protecting the public. He may contract to have a door constructed, a room plastered, or a chimney built, and still not part with the possession of the building or with his right to control and manage the same while it is in process of construction. But in contracts in which the intent of the parties appears either in express terms or by necessary implication that the duties of the owner should be performed by the contractor, he, and not the owner, is liable.

Was the duty of the owner in this case transferred to the contractor Downey? The contract between them is in the form of letters consisting of a written offer by Downey and an acceptance by the American Tract Society. Downey's offer, so far as is material to the question under consideration, is as follows: "We submit to you a proposition to construct the proposed new building for the American Tract Society, we beg leave to state that we would agree to take entire charge of all the work necessitated by the removal of the old

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buildings from the premises, make all excavations, take charge of and be responsible for the protection of the adjoining property and to erect a building, complete, in strict accordance with the architect's plans. \* \* \* To make all contracts for the various departments of work required, subject to your confirmation; to superintend the work in each and every department and to take all possible precautions for the avoidance of extra charges of said contracts and to obtain the best possible competition in the various departments at the lowest possible cost to the owners; to furnish inspectors of unquestionable ability and honesty, whose duty it shall be, in conjunction with our personal superintendence, to see that the contracts entered into are honestly and faithfully kept, and to protect the owners against all imposition by avoiding in every case the use of materials of a proprietary character on which it would be impossible to get proper competition, only using such materials when we could purchase the same at prices proportionate with their actual value. We will be responsible for all loss or damage from accidents during the construction of the building, should such occur, and we will take all proper precautions for the avoidance of such accidents. We will do the carpentry, cabinet work and all work in this department." It will be observed that Downey in express terms undertakes to remove the old building, make excavations for the new, protect the adjoining property and erect a new building complete. It is true that he subsequently proposes to make contracts with others for the various departments of the work, subject to the confirmation of the owner, with the exception of the carpentry and cabinet work and the work in that department. But he also agrees to furnish inspectors of unquestionable ability and honesty, whose duty it should be, in conjunction with his personal superintendence, to see that the contracts are honestly and faithfully kept. He also expressly agrees that he will be responsible for all loss or damage from accidents during the construction of the building, should such occur. It is possible that this clause, standing alone, would be construed as an indemnity to the owner

and not as creating a liability to injured persons under the authority of *French v. Vix* (143 N. Y. 90); but the clause of the contract which follows seems to establish beyond question the clear purpose and intent of the contracting parties. By it Downey agrees to "take all proper precautions for the avoidance of such accidents." By this clause he assumes all of the duties which devolved upon the owner to the public of watching, guarding, giving warning of danger, of barricading or covering the sidewalk, or of doing whatever else would be deemed proper precautions on the part of the owner for the avoidance of accidents. It thus appears to me that he stepped into the shoes of the owner, assumed his duty and liability, and that under the evidence presented by the record it became a question of fact as to whether he had fully discharged these duties to the public. (*Clare v. National City Bank*, 8 J. & S. 104; *S. C.*, 1 Sweeny, 539; *Potter v. Seymour*, 4 Bosworth, 140.)

Are the defendants Weber liable? Downey had entered into a contract with them, which had been approved by the owner, to do the mason work, plastering, etc., which included the brick work. This work they agreed to do according to the directions of the architect and Downey. They agreed to save Downey and the owner from all liability or claim by reason of any accident, loss or damage to life, limb or property that may occur. They, however, did not agree to take proper precautions for the avoidance of accidents, so that they did not assume to perform the duties of the owner or the duties assumed by Downey in this respect. They, however, did, as contractors, owe a duty to the public, which, if they neglected to perform, would render them liable for the damages resulting from such neglect. The brick work had already been laid up for eleven stories. It was their duty to guard and protect the loose bricks so that they could not fall and injure people passing upon the street. Did they do this? The bricks were under their control and management. One fell and caused the injury complained of. It appears to me that this fact raised a presumption of negligence against the

Webers, which cast the burden upon them of showing that they were free from fault, and that the evidence in this case upon that subject should have been submitted to the jury. (*Mullen v. St. John*, 57 N. Y. 567; *Hogan v. Manhattan R. Co.*, 149 N. Y. 23; *Volkmar v. Manhattan R. Co.*, 134 N. Y. 418; *Dohn v. Dawson*, 90 Hun, 271; affirmed, 157 N. Y. 686; *Jager v. Adams*, 123 Mass. 26; *Eccles v. Darragh*, 16 J. & S. 528.)

The order of the Appellate Division should be affirmed and judgment absolute ordered against the appellants, Downey and the Webers, under their stipulations.

PARKER, Ch. J., GRAY, MARTIN, LANDON and WERNER, JJ., concur with O'BRIEN, J.; HAIGHT, J., dissents.

Order reversed, etc.

UNITED WATER WORKS COMPANY LIMITED, et al., Appellants,  
v. THE OMAHA WATER COMPANY et al., Respondents.

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1. CORPORATIONS — REORGANIZATION AGREEMENT — CONSTRUCTION AS TO POWER OF BONDHOLDERS' COMMITTEE. A plan for the reorganization of a corporation, prepared and tendered by a voluntary committee to bondholders, who accept it and deposit their bonds thereunder, should be strictly construed as against the committee and in favor of the *cestuis que trust*.

2. EXTENT OF AUTHORITY OF COMMITTEE — FAILURE TO DISSENT. Where a reorganization agreement provides that a detailed plan of reorganization shall be submitted to the bondholders prior to the conveyance of any purchased property to a new company and that it shall be binding upon them unless a majority in interest shall within thirty days file a written dissent, the committee has no power to incorporate into it anything more than details for carrying out the general provisions of the original agreement, and the failure of the majority to dissent binds them in respect to such details only.

3. DEPARTURE FROM REORGANIZATION AGREEMENT. A bondholders' committee, which is authorized by a reorganization agreement to procure the foreclosure of the mortgage securing the bonds, to purchase the property and convey it to a new company, in which event the committee, after the payment of the expenses of foreclosure and all its own expenses, is to

allot to the holders of certificates, representing the bondholders' interest, their proportionate interest in the new company, has no power, after the purchase of the property under such circumstances as to cut off all other interests in it except that of the certificate holders, to incorporate into its detailed plan of reorganization a provision allotting to preferred shareholders of the old company a large part of the common stock of the new company at ten cents on the dollar; and the failure of a majority in interest of the certificate holders to file a written dissent to the plan does not make it binding upon them, since it is a departure from, and not a mere detail of, the plan contemplated by the original agreement.

4. ASSUMPTION OF POWER BY COMMITTEE. A provision in such detailed plan which authorizes the committee to control all of the stock of the new company until two issues of preferred stock shall have paid five per cent dividends for five consecutive years, at a rate of compensation for the committee to be fixed by themselves, or, in the event of question, by two persons to be selected by them, is unauthorized and beyond the power of the committee, where there is no such provision in the original agreement and no intimation that the bondholders' property was to be controlled for an indefinite period.

*United Water Works Co. v. Omaha Water Co.*, 29 App. Div. 680, reversed.

(Argued May 21, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 15, 1898, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

This action was brought to obtain a judgment declaring null and void a certain conveyance, transfer and assignment made by the Farmers' Loan and Trust Company to the Omaha Water Company, of the property, assets and franchises of the American Water Works Company, purchased by said trust company under foreclosure proceedings, and certain deeds of trust executed by the said Omaha Water Company to the Guaranty Trust Company of New York and to the Farmers' Loan and Trust Company to secure the payment of certain bonds of said Omaha Water Company, ordering the same to be discharged of record and directing the said trust companies and Omaha Water Company to execute and deliver such deeds, conveyances and releases as might be necessary; declar-



ing void all bonds and shares issued by said Omaha Water Company and directing that they be surrendered to the court or to a receiver or trust company appointed to receive them, and enjoining said company, its officers and agents, from executing or transferring any of its bonds or shares or in any way carrying into effect a certain proposed plan of reorganization of the American Water Works Company.

The facts, as far as material, are stated in the opinion.

*George H. Yeaman* for appellants. The scheme of reserving to the committee, as a voting trust, the perpetual control of the new company, to which has been conveyed "the absolute property" of the old bondholders, a property held "in trust" by the defendant, the Farmers' Loan and Trust Company, is fraudulent and against public policy. (*Starbuck v. M. T. Co.*, 60 Conn. 576; *Vanderbilt v. Bennett*, 6 Penn. Co. Ct. Rep. 193; *Mason v. P. M. Co.*, 133 U. S. 50; *Pondir v. N. Y., L. E. & W. R. R. Co.*, 72 Hun, 384; *Merrill v. F. L. & T. Co.*, 24 Hun, 297; *Hollister v. Stewart*, 111 N. Y. 644; *Vatable v. N. Y., L. E. & W. R. R. Co.*, 9 Abb. [N. C.] 271; *F. L. & T. Co. v. N. Y. & N. Ry. Co.*, 150 N. Y. 410; *H. Nat. Bank v. Y. B. Co.*, 74 Fed. Rep. 112; *C. of G. Ry. Co. v. Paul*, 93 Fed. Rep. 878.)

*David McClure* and *Howard Mansfield* for respondents. Upon the established facts the plaintiffs had not sufficient standing in equity to maintain this action. (*N. Y. S. & T. Co. v. Lipman*, 157 N. Y. 551; *Amherst College v. Ritch*, 151 N. Y. 288.) The action was bound to fail, because the reorganization which it assailed was already an accomplished fact. (*White v. Wood*, 129 N. Y. 535; 149 N. Y. 659.) The detailed plan of reorganization was not in any respect illegal. (*Cowell v. Springs Co.*, 100 U. S. 55; *Christian Union v. Yount*, 101 U. S. 352; *Vanderpoel v. Gorman*, 140 N. Y. 563; *Lancaster v. A. I. Co.*, 140 N. Y. 576; *Watts v. Gantt*, 42 Neb. 869; *Carlton v. Aultman*, 28 Neb. 672; *M. L. V. Co. v. Bushnell*, 11 Neb. 192; *M., etc.,*

*R. R. Co. v. Don*, 19 Fed. Rep. 388; *M. & O. R. Co. v. Nicholas*, 12 South. Rep. 723; *Erwin v. P. & R. R. Co.*, 7 R. & C. L. J. 87.)

PARKER, Ch. J. The plaintiffs own a few of the bonds, of which three million six hundred thousand dollars worth were issued secured by a mortgage of four millions given to the Farmers' Loan and Trust Company, as trustee, upon certain water works and plant at Omaha, Nebraska, which were at the time owned by an Illinois corporation known as the American Water Works Company. There was an underlying mortgage of \$400,000, which represents the difference between the actual issue of bonds under the second mortgage and the amount authorized to be issued, but as they could be issued only for the purpose of taking up the first mortgage bonds, there was never any opportunity for their issue. Whatever may have been the earning capacity of the Omaha water works, it seems not to have been profitable to the stockholders of the corporation having the title to it, and for a short period of time prior to the 16th of August, 1893, the owners of the bonds failed to receive the interest due to them, and, as the property had passed into the possession of a receiver appointed by the court, it was not unnatural that the bondholders began to manifest some interest about the future of the property. While the matters were in that general situation some gentlemen of prominence in finance volunteered to serve as a committee for the bondholders (not entirely from philanthropic motives, as a later estimate of \$360,000 for counsel fees and the expenses of reorganization and compensation of the committee indicates). The committee, who styled themselves the "Bondholders' Committee," addressed a communication to each of the several bondholders urging them to deposit their bonds without delay with the Farmers' Loan and Trust Company and inclosed the plan of the committee for their guidance in determining whether to accept the committee to represent them. This plan was dated August 16th, 1893; was addressed to "Holders of Bonds of The American Water Works Company of

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Illinois, secured by mortgage upon the Omaha Water Works ;” and the opening recital was : “ For the purpose of protecting their respective interests, the owners and representatives of a large amount of the outstanding bonds of The American Water Works Company \* \* \* have agreed to the following plan, and have irrevocably appointed the undersigned and their successors a committee for carrying out such plan, which the undersigned have undertaken to do.”

The first subdivision of the plan named the committee and provided, among other things, that, in the event of any vacancy in the committee by death or accepted resignation of a member, it should be filled by a majority of the remaining members.

The second provided that the bonds and coupons should be transferred to the committee in trust for the purpose of carrying out the plan and should be deposited with the Farmers' Loan and Trust Company, which should issue, “ subject to the terms and conditions hereof, its negotiable certificates ;” and that “ such bonds and coupons shall thereafter be held by the trust company in trust for the committee for the purposes of the plan.”

The third provided that the committee should take action to cause the mortgage to be foreclosed as soon as possible.

The fourth authorized the committee, in its discretion, to purchase the property at the foreclosure sale for any price not exceeding the principal and interest then accrued and unpaid on all the bonds, and to apply towards the payment of the property the bonds and coupons deposited.

The fifth related to the first mortgage of \$400,000, and the action that should be taken by the committee in the event of the foreclosure of that mortgage, but, as that did not take place, that subdivision has no bearing on the present discussion.

The sixth subdivision, so far as important, provided that in case the committee should purchase the mortgaged property it might convey the same to the new company incorporated under the laws of such state as the committee might determine.

The seventh empowered the committee to sell all the bonds and coupons for not less than the principal and interest plus the expenses and charges of the trustee and of the committee.

The eighth, among other things, conferred upon the committee the power to borrow money for the purpose of carrying out the plan and authorized it to pledge, for the repayment of any such moneys, any of the bonds and coupons, or any other assets in the hands of the committee.

The ninth assured the committee of a reasonable compensation for its services, as it provided that in case of question the amount should be determined by the presidents of two New York trust companies, both of whom should be selected by the committee.

The tenth provided for an initiatory assessment of \$10 per bond of \$1,000 each, to be paid by the holder upon the deposit of the bonds, toward paying the legal and other expenses of carrying out the plan, to meet which expenses it was provided that the committee might make further assessments. Fourteen days later, however, the committee addressed a further letter to the bondholders, which was apparently intended to assure the bondholders that the assessment for legal and other expenses would not be exorbitant, for it provided: "Any assessment that the committee may make for legal and other expenses on holders of certificates issued for deposited bonds, in addition to the payment at the time of deposit, will not exceed ten dollars per bond;" thus, apparently, providing that both assessments on the bondholders for legal and other expenses should not produce to exceed \$72,000.

Having provided by the seventh subdivision, as we have already observed, that the committee might sell the bonds for not less than the principal and interest, plus the expenses of the trustee and of the committee, the eleventh subdivision assured the bondholders that if a new company should be created the committee would allot to the bondholders, who were to be termed certificate holders after the deposit of their bonds with the trust company, their proportionate interest in the new company.

The twelfth subdivision, which is one of considerable importance on this review, read as follows: "The Committee shall, prior to the conveyance of any purchased property to the new company, submit to the certificate holders a detailed plan of reorganization, which shall be binding upon all said holders, unless the holders of a majority in interest of the outstanding certificates shall, within thirty days, file with the Trust Company their written dissent from said plan."

The thirteenth related to the manner in which a notice from the committee to the certificate holders might be given.

The fourteenth read as follows: "The Committee may supply any defects or omissions in this plan which it shall deem necessary to be supplied to enable the Committee to carry out the general purposes of the plan; and with the consent of the holders of a majority in interest of the outstanding certificates, may take any action other than is provided for in this plan which the Committee shall unanimously determine to be for the benefit ratably of all of the certificate holders."

The fifteenth and sixteenth authorized the committee to determine the time within which bonds and coupons might be deposited, and authorized their return by the committee in the event that a majority of the bonds had not been deposited by November 1st, 1893.

The holders of 3,569 of the 3,600 mortgage bonds issued under the second mortgage, including the holders of the bonds now belonging to this plaintiff, accepted the plan proposed to them by the committee and transferred their bonds to the bondholders' committee by depositing the same with the Farmers' Loan and Trust Company, in pursuance of the agreement of August 16th, 1893, and received therefor negotiable trust certificates, representing their various interests as such depositors. And the holders of certain unpaid coupons of such bonds, which matured prior to January 1st, 1894, made a similar deposit and received separate certificates, with special provisions for such coupons, for the purpose of preserving their status, which was that of a lien on the mortgaged prop-

erty prior to that of the bonds. The title of the bonds being thus vested in the committee, but in trust, nevertheless, for the purpose stated in the agreement of August 16th, it took the necessary steps to have the trust company foreclose the mortgage given to secure such bonds—a mortgage that provided, among other things, that if the trust company bid in under foreclosure it should hold the property in trust as the absolute property of the bondholders. By the terms of the decree of foreclosure, thereafter granted, it was provided that the trust company, designated in the mortgage as the trustee for the bondholders, might bid in the property, and that, in the event that it should do so, it should hold the property so bid in and paid for, with the bonds, in trust as the absolute property of such of the bondholders as should request such purchase, and the bondholders should take and receive the certificates of the clerk of the court, showing their interest in the property. Prior to the sale of the property, pursuant to the decree, the committee fixed upon the sum of four millions and a half as the amount which the trust company could bid for the property in behalf of the committee representing the bondholders, which sum was understood to cover the principal and interest due on the bonds, the costs of foreclosure and the expenses and compensation of the committee. But the trust company bid in all of the property and the franchises for \$4,009,500, on the twentieth day of May, 1896. Inasmuch as the committee had not been able to sell the bonds, but had found it necessary to bid in the property under the plan which had been proposed, it became the duty of the committee to organize a new company and the agreement of August 16th provided that, in such event, the committee should, after payment of the expenses of foreclosure and all expenses incurred by the committee and its compensation, allot to the certificate holders their proportionate interests in the new company. A few days later, on June 9th, the committee issued a circular statement addressed to the remaining bondholders, now styled certificate holders, which was called: "Detailed Plan of Reorganization." It will be remembered that it was provided

by subdivision twelve that a detailed plan of reorganization should be submitted prior to the conveyance of the property to a new company; and the most important of the questions presented on this review is whether the so-called "details of the plan of reorganization," issued June 9th, are in fact details of the original plan, or constitute, in some respects, an entirely different plan and, therefore, are not within the scope of the agreement of August 16th.

This court, in speaking of the so-called modification of a reorganization agreement, in *Cox v. Stokes* (156 N. Y. 491, 507), said: "The reorganization committee were, in a broad sense, trustees for the benefit of the bondholders and were bound to protect their interests in every reasonable way. Their powers were defined and limited by the reorganization agreement. While they had a wide discretion as to all matters not specifically provided for, as to those matters they were bound to compliance with the stipulations of the agreement, which they could neither set aside nor disregard. They had no power to change that agreement without the consent of the bondholders, whose representatives they were. They could not recast it nor surrender rights which it expressly secured to the bondholders. \* \* \* They could not add to their authority by changing the agreement, which was the source and limit of their power, any more than one can add to his stature by taking thought." That which was submitted as a detailed plan of reorganization provided for a new company to be incorporated under the laws of the state of Maine; the committee to name and be eligible to membership in the first board of directors; the new company to be authorized to issue prior lien twenty-five-year five per cent gold bonds to the amount of one million and a half, to be secured by a mortgage on all the franchises and property of the company, a portion of such issue to be used to take up the bonds secured by the first mortgage of \$400,000 which was not foreclosed. It was also authorized to issue consolidated mortgage fifty-year gold bonds to the amount of six millions, to be secured by a mortgage on all the franchises and property of the company, to rank after the prior

lien bonds; to issue first preferred five per cent non-cumulative stock to the amount of not more than \$750,000; also second preferred stock to the amount of not more than \$1,000,000, and common stock to the amount of not more than \$2,500,000, making the total authorized issue of bonds and stock of all classes \$11,750,000. It allotted to the old bondholders no part of the first issue of bonds, amounting to one million and a half, and only three million six hundred thousand of the consolidated six million issue. Bondholders were also to receive beneficial certificates pertaining to the first preferred stock — not the stock itself — amounting to \$540,000, while the \$210,000 remaining of that issue was to be retained for the payment of one-half year's interest on new consolidated mortgage bonds and for the general purposes of reorganization or for the use of the new company. Of the one million issue second preferred stock, the bondholders were to receive beneficial certificates pertaining thereto amounting to \$600,000, while the remaining four hundred thousand was to be given as compensation to holders of depositors' six per cent bonds for reduction to five per cent and for general purposes of reorganization. Beneficial certificates pertaining to the common stock of two millions and a half were to be issued to holders of preferred stock of the American Water Works Company of New Jersey to at least the amount of their holding of the old preferred stock at the price of ten dollars per share. So that no part of this stock was to go to the bondholders, for whose benefit the property was purchased and held in trust, unless some part of the stock should not be disposed of under the plan of reorganization, in which case such residue was to be delivered ratably to the certificate holders. And further, the bonds and beneficial certificates allotted to the bondholders were only to be issued on their paying a cash assessment of fifteen per cent of par value of bonds aggregating \$540,000. As has been observed, a present issue of stock, whether preferred or common, is not provided for, but beneficial certificates instead; and the reason for it is found in the sixth subdivision of the detailed



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plan, which provides that "the stock of the new company of all classes, except such shares as may be disposed of to qualify directors, is to remain in the name of the committee or their nominees, of the same or a less number, and their successors, as joint owners, with unrestricted right to vote thereon, until the first preferred stock and the second preferred stock shall each have received an annual five per cent dividend for five consecutive years. \* \* \* The expenses incurred in carrying out these provisions with regard to the control of the stock are to be borne by the new company."

Thus, we see, that instead of allotting to the certificate holders their proportionate interests in the new company, after payment of expenses of foreclosure and of expenses incurred by the committee, as was agreed in subdivision eleven of the agreement of August 16th, the committee provided in its so-called detailed plan for a sale of beneficial certificates of common stock for ten cents on the dollar to the preferred stockholders of the old company, who had no interest whatever in this property after its purchase for the benefit of the bondholders, thus depriving the bondholders of whatever of value there was in this stock above ten per cent of its face; and further provided for an indefinite, and what might perhaps prove to be a perpetual, control of the property by permitting the committee to retain command over every share of stock, except such as may be necessary to qualify directors, with the right to compensate themselves for the expenses incurred out of the funds of the new company, which they are to control. The new company is to bear these expenses of control because such control is to continue until the first and second preferred stock have each paid a dividend of five per cent for five consecutive years. Whether the five consecutive years means concurrently or alternately the committee are to determine, for the detailed plan provides that the construction of the provisions of these plans by the committee shall be conclusive. The construction might be adopted on which the company should pay a dividend on the first preferred stock for five years and on the second for four years, and then pass

the dividend on the second preferred stock and start over again on the view that the five years must be concurrent. These provisions have the earmarks, to say the least, of an intention to provide for substantially perpetual control on the part of the committee and their successors of property which the committee acquired in trust for the bondholders.

The question that we are to consider under this head is not whether the parties might have lawfully agreed that the committee should be constituted a voting trust for an indefinite period of time, but whether there was such an agreement entered into between the parties.

So also the question arising as to the legality of the proposed disposition of two millions and a half of the common stock to the holders of preferred stock of the American Water Works Company of New Jersey, depends upon the scope of the agreement. The agreement of August 16th did not contemplate the issue of any stock to the stockholders of the American Water Works Company, and the only attempt at justification of the action of the committee that I can find in the brief of the learned counsel for the respondent is stated in these words: "By placing a low price on the certificates, the committee could make some provision for the real owners of the equity of the property. Some such recognition of the stock interests, besides being almost universal in reorganizations, is in this state specifically provided for by statute." The parties to the agreement might have provided for a reorganization that would have considered the interests of the stockholders as well as those of the bondholders, but nothing of the kind was attempted. As we have already noted, the committee styled themselves, from the beginning, the bondholders' committee; its proposition was to utilize the property for the protection of the bondholders and for them alone; the mortgage provided that in the event of a purchase by the trustee it should be for the sole benefit of the bondholders; the decree of foreclosure was in line therewith; every step in the proceeding, from beginning to end, down to the so-called detailed statement of June 9th, proceeded on the theory that

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the committee was acting for the bondholders alone and that the purchase of the property was in trust for them. The stockholders were not parties, nor were they consulted; their interests were not considered and no one suggested their protection. On the contrary, the committee agreed that if the new company should be formed, it would allot to the certificate holders their proportionate interests in the new company after payment of expenses of foreclosure and all expenses incurred by the committee. It was under that agreement, to which the bondholders became parties by the deposit of their bonds and the receipt of certificates therefor, that the committee acquired the right to act in the premises, and by it they were limited to a division and disposition of the securities of the new company either among, or for the benefit of, the bondholders. They acquired under it no right to make a present of any interest whatever in the new company to others than the holders of the bonds, and the attempt to do it, whatever the motive, was in violation of the trust voluntarily assumed.

To the contention generally made that the detailed plan of June 9th, 1896, embraced all matters complained of and that a majority of the bondholders not having dissented within thirty days, it became a part of the agreement, we answer that, in so far as the circular letter of June 9th was a detail of the plan, the contention is well founded, but in so far as it is directly hostile to the agreement, it is not so. The word "detail," as used in this agreement, means minor particulars necessary to complete a reorganization, but consistent with the original plan, and lawful and honest. In matters of substance nothing may be done under the detailed plan that could not have been done under the original agreement. That was the idea conveyed by the use of the word "detail" in the connection in which it appears, and, in view of the fact that the members of the committee were soliciting the trust and confidence of the bondholders when they invited them to become parties to an agreement which they had prepared and tendered, it should be strictly construed as

against the committee and in favor of the *cestuis que trust*. Such a construction necessarily denies to the committee the power, under guise of a detail of the original agreement, to incorporate into it a provision authorizing the committee to permit other parties than the holders of bonds to share in the property which had been bought in for the benefit of the bondholders alone. If this were not so then the committee might have gone further than to dispose of the absolute control of the bondholders' property (in the event that the committee should conclude to part with the control themselves) for a merely nominal sum, as they seek to do by disposition of two million and a half of common stock, and have provided for a disposition of preferred stock, or even of bonds, to persons who they might be persuaded have some equity in the old company that ought to be recognized and compensated. But in the one case, as in the other, the attempt to give away interests in the new company would be in violation of the agreement that after the payment of costs of foreclosure and the costs, expenses and compensation of the committee, the committee should allot to the certificate holders their proportionate interests in the new company, for theirs was the entire interest. The provision that the detailed plan should be binding upon all certificate holders, unless the holders of a majority in interest should within thirty days file their dissent from the plan, does not embrace anything except details of the plan included in the original agreement — does not include matters in contravention of the original plan and hostile to it, by which the rights and interests of the bondholders are sought to be taken away and given to others. The failure of the majority to dissent within thirty days, therefore, confirmed so much of the circular letter of June 9th as was in reality a detail of the plan of August 16th, but in so far as it contained provisions in direct conflict with such plan, it had no effect whatever, as it was not a part of the original agreement, under which the bonds were filed, that its material provisions or any of them could be stricken out and others widely different in effect sub-

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stituted by the committee, unless a majority should dissent within thirty days. It follows, if the views so far expressed be sound, that the committee is without authority to dispose of beneficial certificates pertaining to the common stock, for a nominal sum, to the holders of the preferred stock in the old company. Whether the two millions and a half of stock has been issued we are not advised by this record; for while the plaintiff attempted to show, by a member of the committee, the situation in that respect, the evidence was objected to and excluded and plaintiff excepted.

The reasons assigned for holding that the provisions in the so-called detailed plan, providing for the issue of common stock, are not within the agreement of the parties, and, therefore, the committee is without authority to carry it out, are applicable also to that portion of it which authorizes the committee to control all of the stock until the two issues of preferred stock shall have paid five per cent dividends for five consecutive years at a rate of compensation for the committee to be fixed by themselves, or in the event of question by two persons to be selected by them. There was no such provision in the original agreement, no intimation that the bondholders' property was to be controlled for an indefinite period of time, if not perpetually, by men having no other interest in the company than the compensation to be received for such control. It is a matter of every day occurrence, of course, that men having no financial interest in great properties, other than the compensation to be received for their services, are vested with extensive powers of management and control temporarily, but the power is always reserved in those who own the property to cut down the power of such managers, or to make a change in management; in this case, however, the committee has planned to have the management for an indefinite period of time at a rate of compensation to be substantially fixed by themselves, thus seeking to fasten themselves upon the property in such a way that the real owners of it cannot loosen their hold if they should attempt it; so, if it be suggested that improvements are necessary in order to increase

the earning capacity of the property, the real owners of it are to be deprived of the power to determine whether they shall be made or not. If a hint at any such scheme on the part of the committee had been contained in the original agreement, it may well be doubted whether any of the bondholders would have deposited their bonds under it; for the persons are, I take it, comparatively few who will voluntarily turn over their property to the control of others under such circumstances as will prevent them from retaking control in the event of their becoming dissatisfied with the management of the property. When, for the first time, these important provisions found their way into the circular letter of June 9th, 1896, they appeared there not as a detail of the plan contained in the agreement of August 16th, 1893, and, therefore, for the reasons given in considering whether the issue of common stock was authorized by the agreement, the committee did not, by its assertion, acquire the authority to retain the control of both the preferred and common stock for any period of time whatever.

It is urged by the learned counsel for the appellant that the new company was over-capitalized, and that this court should consider whether the details of the plan are not, therefore, in contravention of a sound public policy; but we have not considered the question for the reason that the record does not show with any degree of certainty what may be the fact in that regard. The plaintiff attempted to prove the value of the property, but the court refused to permit him to do so, and counsel excepted. We think in view of the nature of the action that the evidence should have been received to the end that it might have been determined whether the question that the plaintiff seeks to raise is fairly presented.

The judgment should be reversed and a new trial granted, with costs to abide the event.

O'BRIEN, HAIGHT, MARTIN, LANDON and WERNER, JJ., concur; GRAY, J., dissents.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.  
JAMES J. O'BRIEN, Respondent.

**APPEAL — NON-REVIEWABLE ORDER OF REVERSAL IN CRIMINAL CASE.**  
An order of reversal in a criminal case, that does not, upon its face, exclude the possibility that it was based upon an examination of the facts or made as matter of discretion, presents no question of law reviewable by the Court of Appeals.

*People v. O'Brien*, 48 App. Div. 66, appeal dismissed.

(Argued June 21, 1900; decided October 2, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, made February 9, 1900, reversing a judgment of the Court of General Sessions convicting the defendant of the crime of assault in the third degree.

The facts, so far as material, are stated in the opinion.

*Charles E. Le Barbier* for appellant.

*James W. Ridgway* for respondent. There is nothing before this court to review. Where a judgment of conviction is reversed on the facts by the Appellate Division, its decision is not reviewable by this court. (*People v. Mitchell*, 142 N. Y. 639; *People v. Stevens*, 104 N. Y. 667.) When the order of the Appellate Division does not state upon what ground the judgment of conviction was reversed, it is assumed that the judgment was reversed upon the facts, and the order is not reviewable before this court. (*People v. Boas*, 92 N. Y. 560; *People v. Conroy*, 97 N. Y. 62.)

O'BRIEN, J. The defendant was indicted for the offense of assault in the third degree, and on a trial was convicted by the jury and sentenced to pay a fine of \$50. On appeal to the Appellate Division the judgment was reversed. The order of reversal simply states that it was "ordered and adjudged

that the said judgment so appealed from, as aforesaid, be and the same hereby is reversed."

The order does not state upon what ground or for what reason the judgment was reversed. The defendant was entitled to have the facts examined upon the appeal, and we cannot say that the reversal did not proceed upon that ground. If the court below reversed upon some view of the facts, as it might, this court has no power to review the decision since our jurisdiction is expressly limited to questions of law. We have no power to review a judgment of reversal in a criminal case unless it appears affirmatively in the body of the order that the court below has exercised its power and discretion to review the facts, and that, being satisfied with the judgment in that respect, the reversal was ordered for error of law only. Inasmuch as the order in this case does not, upon its face, exclude the possibility that it was based upon an examination of the facts, or made as matter of discretion, no question of law is presented by the appeal. (*Harris v. Burdett*, 73 N. Y. 136; *People v. Boas*, 92 N. Y. 560; *People v. Conroy*, 97 N. Y. 62; *People v. Stevens*, 104 N. Y. 667; *People v. Mitchell*, 142 N. Y. 639.)

The appeal should, therefore, be dismissed.

PARKER, Ch. J., BARTLETT, VANN, LANDON, CULLEN and WERNER, JJ., concur.

Appeal dismissed.

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In the Matter of the Petition of THOMAS H. SNEDEKER, Respondent, v. ADA MAY SNEDEKER, as Administratrix of CHARLES SNEDEKER, Deceased, Appellant.

DISTRIBUTION OF DAMAGES RECOVERED IN ACTION FOR CAUSING DEATH BY NEGLIGENCE—CODE OF CIVIL PROCEDURE, §§ 1902 ET SEQ. The provisions of the Code of Civil Procedure (§§ 1902 *et seq.*) authorizing the maintenance of an action where a decedent's death was caused by a wrongful act, neglect or default and providing for the distribution of the damages recovered, were intended by the legislature to create a new cause of action for the benefit, as a class, of the husband or wife and next of kin, and when the class consists of the widow and the father only, the latter is, under section 2732, subdivision 7, entitled to share equally



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with the widow in a judgment which she has recovered for her husband's death by negligence, proper deduction being made for the expenses of her action and her commissions upon the recovery as his administratrix.

*Matter of Snedeker v. Snedeker*, 47 App. Div. 471, affirmed.

(Argued June 6, 1900; decided October 2, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, made January 23, 1900, affirming an order of the Surrogate's Court of Kings county directing the payment to the petitioner, as next of kin, of his distributive share of a judgment recoverable by the administratrix herein, under section 1902 of the Code of Civil Procedure.

The facts, so far as material, are stated in the opinion.

*Charles M. Stafford* for appellant. The cause of action under which the judgment was recovered is purely statutory and the intention of the legislature must govern the disposition of the proceeds. (*Mundt v. Glokner*, 24 App. Div. 111.) The intention of the statute is to afford compensation, and only compensation, to those relatives of the decedent who have suffered actual money loss by reason of his death. (Code Civ. Pro. § 1904; *Oldfield v. N. Y. & H. R. R. Co.*, 14 N. Y. 314; *Tilley v. H. R. R. Co.*, 24 N. Y. 471.) The statute must be construed so as to carry out the intention, as evidenced by the entire statute, taken together. Any provision in conflict with the intention thus manifested must give way to such intention. The intention of the statute in question, so manifested, is, in a case like the present, to provide a recovery, first, for the benefit of a surviving wife, and if there be none, then to the next of kin who have suffered pecuniary loss. (*City of Rochester v. Coe*, 25 App. Div. 300; *People v. McGloin*, 91 N. Y. 241; *Matter of N. Y. & B. Bridge*, 72 N. Y. 527; *People ex rel. v. Potter*, 47 N. Y. 375; *People ex rel. v. Hyde*, 89 N. Y. 11; *People ex rel. v. McClave*, 99 N. Y. 83; *People ex rel. v. Butler*, 147 N. Y. 164; *Hege-rich v. Keddie*, 99 N. Y. 258; *Smith v. People*, 47 N. Y. 330; *De Camp v. Thompson*, 16 App. Div. 528.) The statute

never intended to place next of kin in the same position as to sharing in the damages recovered as the widow of the deceased deprived by his death of her only means of support. (*Stuber v. McEntee*, 142 N. Y. 203; *Mundt v. Glokner*, 160 N. Y. 575.)

*A. T. Payne* for respondent. The claim that the widow is entitled to the whole fund is a challenge to the provisions of section 1903 of the Code of Civil Procedure and cannot be maintained. (*Birkett v. K. I. Co.*, 110 N. Y. 508; *Oldfield v. N. Y. & H. R. R. Co.*, 14 N. Y. 316; *Whitford v. P. R. R. Co.*, 23 N. Y. 468; *Tilly v. H. R. R. Co.*, 24 N. Y. 474; *Murphy v. N. Y. C. & H. R. R. Co.*, 88 N. Y. 445; *Meyer v. Hart*, 23 App. Div. 131; *Johnson v. L. I. R. R. Co.*, 80 Hun, 306; *Hegerich v. Keddle*, 99 N. Y. 267; *Stuber v. McEntee*, 142 N. Y. 203; *Lipp v. Otis Bros. & Co.*, 161 N. Y. 562.)

BARTLETT, J. The appellant in this proceeding brought an action under section 1902 of the Code of Civil Procedure against one George Malcolm to recover damages for the death of her husband, Charles Snedeker, caused by the negligent act of the defendant; she recovered a judgment, entered upon the verdict of a jury for \$5,000.00, aggregating \$5,771.95, damages and costs.

The deceased left no children.

The father of the deceased, Thomas H. Snedeker, instituted this proceeding in the Surrogate's Court of Kings county by petition to compel the widow, as administratrix, to render an account of her proceedings in respect to said judgment and pay over to him the distributive share thereof to which he claimed to be entitled.

After hearing the parties, an order was entered in the Surrogate's Court granting the prayer of the petition, directing an accounting and a deduction of the expenses of the action in which the judgment was recovered, together with the commissions of the administratrix.

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The Appellate Division affirmed the order and appeal was taken to this court. The widow claims that the action in which the judgment was recovered is statutory and unknown to the common law, the recovery no part of decedent's estate, and she is entitled to the entire amount realized. The father of the deceased insists that as his son left no children he is entitled to share with the widow the net proceeds of the judgment.

The adjustment of these conflicting claims depends on the construction to be given the sections of the Code of Civil Procedure governing the action instituted by the administratrix.

Section 1902 allows the action to be brought by "the executor or administrator of a decedent, who has left, him or her surviving, a husband, wife, or next of kin."

Section 1903 reads as follows: "The damages recovered in an action, brought as provided in the last section, are exclusively for the benefit of the decedent's husband, or wife, and next of kin; and when they are collected, they must be distributed by the plaintiff, as if they were unbequeathed assets, left in his hands, after payment of all debts, and expenses of administration. But the plaintiff may deduct therefrom the expenses of the action, and his commissions upon the residue; which must be allowed by the surrogate, upon notice, given in such a manner and to such persons, as the surrogate deems proper."

Section 1904 provides, in part, that "the damages awarded to the plaintiff may be such a sum as the jury \* \* \*, the court or the referee, deems to be a fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons, for whose benefit the action is brought."

Section 1905 provides: "The term 'next of kin' as used in the foregoing sections, has the meaning specified in section 1870 of this act."

Section 1870 reads: "The term 'next of kin' as used in this title, includes all those entitled, under the provisions of law relating to the distribution of personal property, to share

in the unbequeathed assets of a decedent, after payment of debts and expenses, other than a surviving husband or wife."

The provisions of law relating to the distribution of personal property as applicable to this case are found in section 2732 of the Code of Civil Procedure, subdivision 7. This subdivision, where there are no children, divides the surplus between the widow and the father.

The action thus provided for is purely statutory, has existed in this state for many years substantially as now found in the Code and has been repeatedly considered by the courts.

The general scheme of the action may be briefly stated as follows: An executor or administrator can sue only where decedent leaves husband, wife or next of kin; when the action is brought it is for the exclusive benefit of husband, or wife, and next of kin; the proceeds of the recovery are to be distributed among the class named, as if they were unbequeathed assets remaining after payment of debts and expenses; the statute providing for the distribution of personal property is to govern.

In *Oldfield v. N. Y. & Harlem R. R. Co.* (14 N. Y. 310), in considering the law as then existing (Laws 1847, chap. 450), this court said (p. 316): "The statute does not, as has been supposed by some, only create a liability in those cases where the relations of the persons to be indemnified to the person killed were such that the former had a legal right to some pecuniary benefit which would result from a continuance of the life of the latter, and which was lost by the death. It is applicable to the case of any person, where death ensues, who could himself, if living, have maintained the action, and cannot justly be limited to the cases of a wife for the loss of a husband, or children of parents."

It is then pointed out that the words "husband or wife" are used to designate persons who would not be included in the term "next of kin."

In *Tilley v. Hudson River R. R. Co.* (24 N. Y., at page 474) this court again construed the act: "Next of kin are

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embraced in its language, as parties who may be pecuniarily injured by the death of a person to whom they stand in that relation; and it is not required that the degree of kindred should be such as to create the duty of sustenance, support or education. It is well settled, that the survivorship of a wife is not essential to the maintenance of the action."

In *Murphy v. N. Y. C. & H. R. R. Co.* (88 N. Y. at page 447) this court further expressed itself as follows: "Under the statute of 1847 as amended it matters not that some of the next of kin for whom the action is prosecuted may suffer greater pecuniary loss from the death than others. The sum to be recovered by the personal representative represents the entire pecuniary loss resulting from the death to each and all the relatives mentioned in the statute."

It seems very clear that the legislature intended to create a new cause of action for the benefit of the husband or wife and next of kin of a decedent as a class and the damages were supposed to cover the pecuniary losses suffered by every person constituting it.

In the case at bar the class consists of the widow and father.

It does not follow that the father has no pecuniary interest in the death of his son. It might have happened had the son survived thirty years that his wife would have died childless and he be left as the only support of an aged and penniless father; or, if no father was living, but several next of kin of the same degree, it is within the range of possibilities that the decedent might have accumulated within his added years of life a considerable estate and then died leaving it to them. The statute evidently deals with remote and uncertain damages not recoverable at common law.

We are not insensible to the peculiar hardship of this case where a widow, left without means of support, is compelled to divide the net amount of the judgment she has recovered as administratrix with a man of means, possessed of considerable real and personal property. We must, however, construe the law as it is written regardless of the seeming injustice inflicted in particular cases by the existing rule.

The pain-taking and able brief of the appellant's counsel contains excellent arguments calculated to persuade the legislature that the statute should be so amended as to prefer the widow and the fatherless, left without means of support, over the next of kin whose interest is, in such instances, speculative and remote.

The order of the Appellate Division should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, HAIGHT, VANN, LONDON and CULLEN, JJ., concur.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM H. KASTOR, Respondent. v. HENRY S. KEARNY, Commissioner of Public Buildings, Lighting and Supplies of the City of New York, Appellant.

CIVIL SERVICE—NEW YORK CITY—TENURE OF PROBATIONARY APPOINTEE. Where one has been appointed to a position in the civil service of the city of New York for a probationary term, as prescribed by the civil service rules of that city, he cannot be removed during such term except for cause after an opportunity to explain, and a rule providing for his peremptory discharge during the term, without notice of charges or an opportunity to be heard, is invalid, and his peremptory discharge thereunder unlawful.

*People ex rel. Kastor v. Kearny*, 49 App. Div. 125, affirmed.

(Argued June 5, 1900; decided October 2, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, made March 9, 1900, reversing an order of Special Term denying a motion for a peremptory writ of mandamus to reinstate relator as clerk in the department of public buildings, lighting and supplies of the city of New York, and granting said motion.

The facts, so far as material, are stated in the opinion.

*John Whalen*, Corporation Counsel (*Theodore Connolly* of counsel), for appellant. If a short term of office or employ-

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ment makes manifest to the head of a department that the officer or employee is, for any reason, an unfit or improper person for his position, he should then be dismissed. It is impossible to foretell what term of probation shall be sufficient in any one case, as each must stand by itself. (*People ex rel. v. Lyman*, 157 N. Y. 368; *Chittenden v. Wurster*, 152 N. Y. 345.) The fact that the relator was a regular clerk in a department does not in any way alter his position. He was without special rights during his probationary period. (*People ex rel. v. Dalton*, 158 N. Y. 175; L. 1897, ch. 378, §§ 124, 1543.)

*Julius M. Mayer* and *Abm. S. Gilbert* for respondent. A regular clerk in a department of the city of New York cannot be removed except for cause and unless he has an opportunity to make an explanation. (*People ex rel. v. Thompson*, 94 N. Y. 451; L. 1897, ch. 378, § 1543; *People ex rel. v. La Grange*, 2 App. Div. 444; *People ex rel. v. La Grange*, 7 App. Div. 311; *People ex rel. v. Board of Fire Commissioners*, 72 N. Y. 445; *People ex rel. v. Hertle*, 28 Misc. Rep. 37; 46 App. Div. 505; *People ex rel. v. Brady*, 43 App. Div. 60.) The probationary period means the whole period of probation, and during said period relator could not be summarily removed. (L. 1883, ch. 354, § 2; L. 1899, ch. 370, § 8; *People ex rel. v. Lyman*, 157 N. Y. 384; *Matter of Balcom*, 28 Misc. Rep. 7; *People ex rel. v. Roosevelt*, 23 App. Div. 533; *Matter of Murray*, 18 App. Div. 337.)

LANDON, J. The relator stood first on the eligible list of the municipal service commission for appointment as senior clerk in the department of public buildings. This was in the classified service. The defendant appointed him senior clerk of the department, to take effect June 13, 1899, and the relator entered upon his duties. On June 17, 1899, the defendant discharged him, assigning no cause and giving him no hearing. He demanded and was refused reinstatement, and moved for a writ of mandamus at Special Term. The

motion was denied. The Appellate Division reversed the order denying the motion, and awarded the writ for the reinstatement of the relator.

At the time of his appointment chapter 370, Laws 1899 was in force — and so far as its provisions are applicable to the city of New York, they supersede the provisions of its charter inconsistent therewith. (*People ex rel. Fleming v. Dalton*, 158 N. Y. 175.) Section 8 provides: "All appointments or employments in the classified service shall be for a probationary term, not exceeding the time fixed in the rules." The act provides for the making of rules, but none had been made. The Appellate Division assumed that the rules in force, made under section 124 of the charter, applied until superseded by new rules. Both parties concede this assumption to be correct under section 27 of the act. Under section 124 of the charter the municipal civil service commission was authorized to provide "for a period of probation before an appointment or employment is made permanent." The commission had provided by rule 35 that "all employment in positions under any of the schedules, except Schedule G, shall be provisional, and such provisional service shall continue six months except in Schedule C, when it shall be for one month, *during which period the person so employed may at any time be peremptorily discharged from service.*" The relator's office was not in either Schedule G or C. The rule seems to limit the power of peremptory discharge to persons appointed under Schedule C. The Appellate Division held that the last clause of this rule was void as in excess of the power granted by section 124 of the charter. In this view we concur.

"A probationary term" or "a period of probation" implies definite or stated length of duration, especially so when such term or period is to be provided in advance. It is not "any time" within a fixed length of duration, unmeasured by the rules, and measurable by the pleasure or will of the appointing power. Probation or probationary implies the purpose of the term or period, but not its length; the rules could fix its length, for so the statute provides, but



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could not make its length provisional in point of time, for that would be to unfix it or annex an unauthorized item. While the primary purpose of the law is to secure efficient service, yet the probationary appointee is thereby secured an experimental trial for the period prescribed by the law or the rules made in pursuance of the law, and he is not to be condemned pending the trial before the time, given him to show his fitness, has expired, except after an opportunity to explain under section 1543 of the charter. In *People ex rel. Sweet v. Lyman* (157 N. Y. 368) the appointee served out his probationary term, less one day, and the case was decided upon other grounds and does not apply. The case, then, is, that the relator was appointed for a probationary term of six months, and the provision of rule 35 providing for his peremptory discharge during his probationary term, without notice of charges or opportunity to be heard, was invalid, and, therefore, the relator's peremptory discharge under that provision of the rule was unlawful.

The order should be affirmed, with costs.

PARKER, Ch. J. It is not unlikely that the public interests would be best subserved if the statute should provide that, during the probationary period, the person so employed might be peremptorily discharged from the service, but as it does not, I agree with Judge LANDON that so much of the rule as attempts to confer upon the appointing power that authority is invalid.

HAIGHT, J. (dissenting). The relator, having passed the civil service examination, was appointed senior clerk and bookkeeper in the department of public buildings, lighting and supplies by the defendant, as commissioner. After serving a few days the relator was discharged, and he is now seeking mandamus for his reinstatement. His right to the relief sought depends upon the validity of rule 35 of the municipal civil service commission of the city of New York. It provides as follows: "All employment in positions under

any of the schedules, except Schedule G, shall be provisional, and such provisional services shall continue six months, except in Schedule C, when it shall be for one month, during which period the persons so employed may, at any time, be peremptorily discharged from service." The statute in force at that time provided that "all appointments or employments in the classified service shall be for a probationary term not exceeding the time fixed in the rules." (Laws 1899, chapter 370, section 8.) The rule, as we have seen, provides for a provisional service for six months, but authorizes the discharge of the person employed at any time during that period. It is claimed that the authority to discharge at any time during the provisional service of six months is obnoxious to the statute, and, therefore, to that extent the rule is void. I do not so read the statute. The provisions of the statute require all appointments or employments to be for a probationary term, but that term must not exceed the time fixed in the rules. The statute in no place states that the time shall be for six months or for a period fixed by the rules; it provides that it shall not exceed that time. It may, therefore, be for a shorter time. Probation, as defined by Webster, signifies a proceeding to ascertain the truth, to determine character, qualification, etc. It is an examination or a trial. No lexicographer that I have been able to examine gives to the word the meaning of definite time. Of course, every examination or trial to determine fitness and capacity involves some time. In some cases it may be short, in other cases it may be long. Officers charged with a determination of the qualifications of applicants for positions may, in some instances, discover a radical defect in the applicant on the first day of a trial, while in other cases the discovery may not be made in months. It, therefore, appears to me that it was intended by the statute to leave the question of time to the discretion of the appointing officer, not, however, exceeding the time fixed by the rules, and permitting him to remove whenever he became satisfied that the applicant was not competent and that the civil service commissioners, in adopt-

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ing the rule, correctly construed the true meaning and purpose of the statute.

It is said that this construction of the statute would permit officers having appointments to make under the civil service to appoint applicants and then discharge them until the name of a person was reached lower down upon the list that the officer desired to appoint. There are several answers to this contention. *First*. No complaint in court, thus far in the history of civil service, has been made of any officer attempting to so violate the statute. *Second*. If he did violate the statute he would be guilty of official misconduct and become liable to a removal from office. And *third*. There is no necessity for an officer to appoint persons in order to remove them, for the reason that he is given the power, in the first instance, to select the person that he desires if his name is upon the eligible list and certified by the civil service commissioners. (*People ex rel. Balcom v. Mosher*, 163 N. Y. 32.)

Again, it is said that the probationary term provided for by the statute is to enable the applicant to demonstrate his fitness to the appointing officer; but why is a probationary term necessary to enable him to do this? He could satisfy the appointing officer of his fitness as well under a permanent appointment as under a probationary one, and, consequently, the probationary statute affords him no relief and is unnecessary. Such does not appear to be the purpose of the probationary statute. The civil service statute prohibits a removal without notice given and an opportunity for a hearing. (Greater New York Charter, section 1543.) The officer was, therefore, called upon to make an appointment practically for life or during the good behavior of the applicant. But before making such an appointment he is required by the statute to subject the applicant to a probationary trial in order that his qualifications and capacity may be determined by a practical test. This provision of the statute, it appears to me, was intended for the benefit of the office and the public who are interested in having fit and competent persons fill the public positions. (*People ex rel. Sweet v. Lyman*, 157 N. Y. 368.)

If the probationary trial is for the benefit of the appointee then he is entitled to a full period of six months, the last day and the last hour in which to qualify himself for the position and to induce the officer to retain him, even though his defects were numerous and apparent to the officer from the first day of his service. Not only this, but he is entitled to perform the duties of the particular position to which he has been appointed during the full period fixed by the rule. This may result in a very serious injury to the public service and to the officer who is held responsible for the proper conduct of the office in which the appointee is given service. He may be slow and allow the work to accumulate to such an extent as to practically block the business of the office. He may be careless and inaccurate in figures and thus involve his principal in financial liabilities, but still he is entitled to discharge the duties of his position for the purpose of seeing whether he cannot overcome his defects during the liberal period given by the rules. But it is said that he may be discharged for cause after a hearing; so he could if his appointment was permanent and not probationary. If the probationary appointment is to be given the same force and effect as a permanent appointment, there is no use of a probationary trial, and the statute so providing is unnecessary. But such was not the legislative intent. The statute is a wise one and was intended to accomplish a just result. Restrictions have been placed upon removals of permanent appointees, and such removals may become subject to review in the courts. For this reason a probationary trial has been provided, during which the statute has placed no restriction upon the power of the officer to remove. Civil service is for the public good. It was never intended to embarrass the faithful discharge of duties by public officers, or to endanger the proper administration of such offices. It provides a scheme for supplying the public service with honest, capable and intelligent servants. Applicants must not only pass mental, physical and educational examinations, but they must also submit to practical trials with reference to the duties of the position itself. All

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these requirements must be met before they become entitled to a permanent appointment. Having met them and received the permanent appointment, the statute then steps in, and not until then, and protects them in their position and prevents their removal except after notice of cause and an opportunity for a hearing.

The order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs.

PARKER, Ch. J. (in memorandum), O'BRIEN, BARTLETT, VANN and CULLEN, JJ., concur with LANDON, J., for affirmance; HAIGHT, J., dissents.

Order affirmed.

In the Matter of the Accounting of ALEXANDER B. CRANE, as Substituted Trustee of LEWIS F. BATTELLE, Deceased.

C. LEWIS BIGGS et al., Appellants; DUNCAN EDWARDS et al., Respondents.

**CONSTRUCTION OF WILL—VESTED OR CONTINGENT REMAINDER.** Under a will which bequeaths the residue of the estate to the executors in trust, commands them to sell the real estate, convert the personalty into cash and invest the proceeds, directs that the trust term shall be measured by the life of the testator's wife, to whom the executors are to pay an annuity, and provides that "upon the decease of my said wife I order and direct that my estate be divided" equally between his brothers and sisters and niece, each to take an equal share, except that from the share of one of the brothers a certain sum shall be deducted "which sum I do give and bequeath to be paid to my nephew," and further provides that the share of such brother and another brother shall be held in trust during their lives, the income to be paid to them and the principal to their issue in equal shares after their death, and further provides that if any of the brothers and sisters or the niece shall die before the testator's wife, leaving lawful issue him or her surviving, the share of one so dying shall be paid over to his or her issue in equal shares, and if no issue survives, then the share is to be divided among the survivors and the lawful issue of any of one or more of them who shall have died leaving lawful issue surviving, each one of the said survivors taking one equal share thereof, and the lawful issue of any one deceased to take the share of the parents, if one, solely, if more than one, jointly and equally, the brothers, sisters and niece of the testator

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take contingent remainders only, and not vested remainders subject to be divested as to any one of them by his or her death prior to the decease of the testator's wife; and in the event of the death of one of them before the widow, those of his or her children who survive the widow take to the exclusion of an assignee of a child who died unmarried and leaving no issue after the death of the parent but during the lifetime of the widow; since aside from the direction to the executors or trustees to divide and distribute the estate upon the death of the widow, there are no words importing a gift, and where the only gift is found in a direction to divide, or pay, at a future time, the gift is future not immediate; contingent and not vested.

*Matter of Crane*, 36 App. Div. 468, reversed.

(Argued June 4, 1900; decided October 2, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, made January 31, 1899, affirming a decree of the Surrogate's Court of the county of New York judicially settling the account of Alexander B. Crane, as substituted trustee under the last will and testament of Lewis F. Battelle, deceased, and construing certain parts of said will.

The facts, so far as material, are stated in the opinion.

*Stephen O. Lockwood* for appellants. The decisions of the Supreme Court, Appellate Division and of the Surrogate's Court rest upon the rule that the law favors the vesting of legacies, and they subvert the intention of the testator by not giving due consideration to the will or to certain other rules of interpretation applicable to it. (2 Redf. on Wills, 379; *Teed v. Morton*, 60 N. Y. 506; *Vincent v. Newhouse*, 83 N. Y. 511; 3 Jarman on Wills, 588, 744; *Clark v. Cammann*, 160 N. Y. 315.) The testator intended to divide his residuary estate upon the death of his widow among living legatees; he did not intend to vest any interest in brothers, sisters and niece or their issue, during the lifetime of his widow. (1 Redf. on Wills, 451; *Matter of Mosely*, L. R. [5 App. Cas.] 714; *Matter of Brown*, 154 N. Y. 314; *Clark v. Cammann*, 14 App. Div. 127; *DeLafield v. Shipman*, 103 N. Y. 463; *Shipman v. Rollins*, 98 N. Y. 311; *Geisse v. Bunce*, 23 App.

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Div. 289; *Parker v. Tootal*, 11 H. L. Cas. 164; *Smith v. Edwards*, 88 N. Y. 92; *Teed v. Morton*, 60 N. Y. 506; *Vincent v. Newhouse*, 83 N. Y. 511.) The interest of William S. Biggs in the estate was contingent until the death of the testator's widow; and the assignment thereof by him to Edwards and Davis became inoperative by reason of his death before the testator's widow. (*Teed v. Morton*, 60 N. Y. 506; *Matter of Baer*, 147 N. Y. 348; *Smith v. Edwards*, 88 N. Y. 92; *Delaney v. McCormack*, 88 N. Y. 174; *Warner v. Durant*, 76 N. Y. 136; *Vincent v. Newhouse*, 83 N. Y. 511; *Delafield v. Shipman*, 103 N. Y. 463; *Hobson v. Hale*, 95 N. Y. 588; *Shipman v. Rollins*, 98 N. Y. 311; *Matter of Brown*, 154 N. Y. 314.)

*Duncan Edwards* for respondents. The testator's intention must outweigh any rule of construction to which it is opposed. (*Matter of Young*, 145 N. Y. 535; *Miller v. Gilbert*, 144 N. Y. 68-73; *Shipman v. Rollins*, 98 N. Y. 311; *Bisson v. W. S. R. Co.*, 143 N. Y. 125.) If the distribution in the future of a trust estate under a will appears to be postponed simply to let in some intermediate estate, the ulterior legatees will take a vested interest at the death of the testator, and in this case at the earliest possible moment. (*Matter of Embree*, 9 App. Div. 602; 154 N. Y. 778; *Peckham v. Gregory*, 4 Hare, 396; *Matter of Bennett*, 3 K. & J. 280; *Matter of Theed*, 3 K. & J. 379; *Halifax v. Wilson*, 16 Ves. 171; *Loder v. Hatfield*, 71 N. Y. 92; *Matter of Young*, 145 N. Y. 535; *Flanagan v. Staples*, 28 App. Div. 319; *Martin v. Holgate*, 1 Eng. & Ir. App. 175; *Campbell v. Stokes*, 142 N. Y. 23.)

PARKER, Ch. J. On this review we are called upon to construe the will of Lewis F. Battelle, who, at the time of its execution, had no descendants, but had a wife, seven brothers and sisters and a niece. After providing for the payment of his debts and funeral expenses he gave to his wife his household furniture, the contents of his stable and ten

thousand dollars in money, and to two of his sisters and his brother Thomas certain legacies, after which he devised and bequeathed all the rest of his estate to his executors in trust, commanding them to sell and dispose of all of his real estate, to convert his personalty into cash, and to invest the avails of such sales and collections in bonds secured by mortgages on real estate in the city of New York or in Jersey City, New Jersey. He provided that the trust term should be measured by the life of his wife, to whom the executors were to pay an annuity of three thousand dollars, and also provided for annuities to two of his sisters and a niece. So much of the will as relates to the disposition of the principal of the trust after the death of his wife reads as follows: "*Sixth*. Upon the decease of my said wife, I order and direct that my estate be divided as follows, viz.: Equally between my brothers and sisters and my niece, Flora W. Bulkley, each one to take one equal share thereof, provided, however, that from the share which my brother Charles B. Battelle will be entitled to there shall be deducted the sum of five thousand dollars, which sum I do give and bequeath to be paid to my nephew Lewis Francis Battelle, son of my brother Cornelius; and provided further, that as to the share of my brother Charles B. Battelle, I direct that the same be invested by my executors and the interest and income thereof be applied to his use during his life, and from and after his decease that the principal thereof be paid to his lawful issue in equal shares; and as to the share of my brother Thomas D. Battelle, I direct that the same be invested by my executors and the interest or income therefrom be applied to his use during his life; and after his decease that the principal be divided among my remaining brothers and sisters, and provided further that if my said nephew, Lewis Francis, shall depart this life before my wife, then the said five thousand dollars is to be divided equally between his sisters then living, and provided further, that if any of my said brothers and sisters and niece shall depart this life before my said wife, leaving lawful issue him or her surviving, then the share of the one so dying shall be



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paid over to their issue in equal shares. Should they leave no lawful issue him or her surviving, then the share is to be divided among the survivors and the lawful issue of any one or more of them who shall have died leaving lawful issue him or her surviving, each one of the said survivors taking one equal share thereof, and the lawful issue of any one deceased to take the share of the parents, if one solely, if more than one, jointly and equally."

The testator's seven brothers and sisters and his niece, Flora W. Bulkley, survived him, but all died during the lifetime of the widow, four leaving issue who survived the widow and four without issue. One of his sisters, Emma Biggs, died during the lifetime of the widow leaving six children, one of whom, William S. Biggs, assigned his interest under the will of the testator to the respondents and died during the lifetime of the testator's widow unmarried and leaving no issue. The other five children of Emma Biggs survived the testator's widow and claimed upon the accounting of the executors before the surrogate to be entitled to the share which their mother would have received had she survived the testator's widow, their contention being that the share of their mother remained contingent until the death of the testator's widow, and hence should be paid to her five living children; but the surrogate adjudged that the one quarter part of the estate which would have been paid to Emma Biggs had she outlived the testator's widow vested in her issue at her death and should be divided into six equal parts, one of which should be paid to each of the five surviving children of Emma Biggs and the remaining part to the assignee of William S. Biggs. The Appellate Division agreed with this determination and affirmed the decree. In reaching this conclusion the court below construed the will as vesting the remainders given to the brothers and sisters and the niece immediately upon the death of the testator, subject to be divested as to any of the parties by their death prior to the decease of the testator's widow, and in the case of the death of a party leaving issue, then on such death vesting the share of the parent in the issue.

We are unable to agree with the courts below in the construction given to this provision of the will. In the first place, it will be noted that there is no direct gift of the principal of the trust estate, but instead a direction to divide it on the death of the testator's widow. The will provides: "Upon the decease of my said wife I order and direct that my estate be divided as follows, viz. : Equally between my brothers and sisters and my niece, Flora W. Bulkley, each one to take one equal share thereof. \* \* \* Provided further, that if any of my said brothers and sisters and niece shall depart this life before my said wife, leaving lawful issue him or her surviving, then the share of the one so dying shall be paid over to their issue in equal shares." Two well-known rules of construction are applicable to this provision: *First*. Where the only words of gift are found in the direction to divide or pay at a future time the gift is future, not immediate; contingent and not vested. (*Matter of Baer*, 147 N. Y. 348, 354; *Delafield v. Shipman*, 103 N. Y. 464; *Delaney v. McCormack*, 88 N. Y. 174, 183.) *Second*. Where the gift is of money and the direction to convert the estate is absolute, the legacy given to a class of persons vests in those who answer the description and are capable of taking at the time of the distribution. (*Teed v. Morton*, 60 N. Y. 506; *Matter of Baer*, *supra*, 353; *Smith v. Edwards*, 88 N. Y. 92.) In the latter case Judge FINCH said: "It has been often held, that if futurity is annexed to the substance of the gift, the vesting is suspended; \* \* \* that where the only gift is in the direction to pay or distribute at a future time, the case is not to be ranked with those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift." It is true that, to these general rules of construction there are exceptions, and the cases noting them can be grouped under two heads: *First*. If the postponement of the payment is for the purpose of letting in an intermediate estate, then the interest shall be deemed vested at the death of the testator and the class of legatees is to be determined as of that date, for futurity is not annexed to the substance of the gift.

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To the contention that it has been held that *Matter of Embree* (9 App. Div. 602, affirmed in this court on opinion below) is within that exception and, therefore, this case is, we answer that in the *Embree* case (in the language of the opinion) "Whatever contingency existed at the time the will was executed entirely disappeared at the time of the testator's death;" for the testator left no issue and the class was fixed upon his death and consisted of the children of his brothers and their heirs, while in this case the class was to be determined at the death of the widow and to consist of the brothers and sisters and niece surviving her, and the issue of those who had died leaving issue. The contingency upon which the number in the class was made to depend was the death of one or more of them without issue prior to the death of the widow. It is a fact that all of them died and only four left issue, and thus there were but four in the class when the event occurred upon the happening of which the number in the class was, by the terms of the will, to be determined. In the *Embree* case, therefore, the class was fixed at the death of the testator, in this at the death of the widow, and hence the direction to divide at that time annexed futurity to the substance of the gift, and thus the case is brought within the rules to which reference has been made, unless it may be said to be within the other exception now to be mentioned.

The second exception is where there are words importing a gift in addition to the direction to executors or trustees to pay over, divide or distribute; in such a case the general rule of construction does not govern because the language employed, outside of the direction to divide or distribute, imports a gift and, therefore, the situation is precisely as if the will contained words of gift. In other words, to state the proposition in familiar phrase, where from the examination of the whole will it is apparent that it was the intention of the testator that the estate should vest in the beneficiaries immediately upon his death, the rule governing where there is merely a direction to divide at a future time must be subordinated to that broader rule which requires that the intention of the testator

shall control where it can be ascertained "within the four corners of the will." The remaining question then is whether such an intention can be found in this will, for if it cannot the two general rules of construction, to which reference has been made, require the court to hold that the interest of the beneficiaries in the trust estate was contingent until the death of the testator's wife.

If it were the testator's intention to vest his estate in his brothers and sisters and niece at the time of his death, then under the conditions that existed at his death each brother and sister and the niece had a one-eighth vested interest liable to be divested; and, also, each of them had a contingent interest (one-seventh minimum, with increasing fractions by death) in the other shares, contingent on each of the others' lives; the issue on the death of the parents to take a vested interest in the original share of the parent, and have a contingent interest in the share of each of the remaining brothers and sisters and niece, and also in the five thousand dollars intended for Lewis Francis Battelle. Such an intention cannot be ascertained as a result of an application of the general rules of construction, as we have seen, nor can it, we think, be spelled out of either the language employed or the general scheme of the will. By it the estate devised to the executors in trust was in its entirety to continue in their possession and under their control as trustees until the death of the testator's widow, the legatees named in the sixth section of the will not being permitted by virtue thereof to take any advantage by possession or enjoyment until the death of the widow. Upon the death of the widow the trust estate was to be divided into actual shares and distributed, the shares to be equal with the exception that the sum of five thousand dollars (given to his nephew Lewis F. Battelle, if then living, or if dead, to Lewis' sisters, if then living) was to be deducted from the portion designated in the will as the share of Charles B. Battelle. This latter bequest of five thousand dollars to Lewis, it is urged, furnishes strong evidence that it was the intention of the testator that the trust estate should vest at his

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death in the beneficiaries named, the argument made being that the testator intended that Lewis should receive this legacy in every contingency except that of his failure to survive the widow, for, if the remainder given to the testator's brother Charles be held to be contingent on his surviving the widow, then, in the case of the death of Charles before the widow (which has happened), there would be no share of Charles from which the legacy to Lewis could be taken, a difficulty that is wholly obviated by holding that the share vested in Charles upon the testator's death.

A careful examination of the sixth provision discloses that this argument has less of force than appears upon a casual reading of it. In the first place Charles' share, so called, was not to be paid to him upon the death of the widow, but was to be set aside by the executors and held in trust during Charles' life, the income only to be paid to him, the principal to be paid over to his issue at his death, while in the event of his death and that of his issue as well, no such share was to be either invested or paid, in which event, necessarily, this sum of five thousand dollars would be deducted from the aggregate before the shares of the others could be paid to either Lewis F. Battelle or his sisters, should they, instead of Lewis, survive the widow. The five-thousand-dollar legacy to the nephew was not contingent upon the life of Charles B. Battelle at all, for it was relieved from any such contingency by the phrase, "which sum I do give and bequeath to be paid to my nephew." Again, it should be noted that every legatee under the sixth subdivision of the will had an interest in this five thousand dollars until the death of the widow, conditioned upon the lives of Lewis F. Battelle and his sisters. The words "equally between my brothers and sisters and my niece Flora W. Bulkley, each one to take an equal share," in so far as they refer to the shares of the brothers Charles and Thomas, were qualified by other provisions of the sixth clause which reduced their interests, in the event of their outliving the widow, to life estates. The provision "that if any of my said brothers and sisters and niece shall depart this life before my

said wife, leaving lawful issue him or her surviving, then the share of the one so dying shall be paid over to their issue in equal shares," was apparently intended to substitute the issue of parents dying after the will was made for the parents in the class to which they would have belonged if living at the death of the widow, the issue standing in the place of the ancestor as one of the class among whom the shares were to be divided. While the sixth clause opened with a direction to the executors to divide the estate equally between the brothers, sisters and niece upon the death of the widow, and was followed by qualifying clauses commencing with "provided however" and "provided further," adding thereto a further direction as to how and among whom this aggregate fund should be divided and portions paid over and other portions invested, thus giving to the trustees explicit instructions as to how they should determine once for all at the death of the widow, the persons among whom the estate should be divided and their respective shares.

Without pursuing this subject further I state the conclusion at which we have arrived: That aside from the direction to the executors or trustees to divide and distribute the estate, there are no words importing a gift, and hence it becomes our duty to give force and effect to the rule that where the only gift is found in a direction to divide or pay at a future time, the gift is future, not immediate; contingent and not vested.

The order should be reversed and the decree of the surrogate so modified as to divide the share which Emma Biggs would have received had she outlived testator's widow, among her five surviving children, with costs to the appellants in all courts.

O'BRIEN, HAIGHT and LANDON, JJ., concur; BARTLETT and VANN, JJ., dissent; CULLEN, J., not sitting.

Order reversed, etc.

AMASA WORTHINGTON, Appellant, v. THE LONDON GUARANTEE  
AND ACCIDENT COMPANY, Respondent.

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1. MUNICIPAL COURT OF THE CITY OF NEW YORK IS NOT A NEW LOCAL AND INFERIOR COURT — JURISDICTION OVER FOREIGN CORPORATIONS — CONSTITUTION, ART. 6, § 18. The Municipal Court of the city of New York is a continuation, consolidation and reorganization of the District Courts of the old city of New York and the Justices' Courts in the first, second and third districts of the old city of Brooklyn under a new name, and is not a new local inferior court within section 18 of article 6 of the Constitution authorizing the legislature to establish inferior local courts, but prohibiting it from "hereafter" conferring upon any inferior local court of its creation any equity jurisdiction or any greater jurisdiction in other respects than is conferred upon County Courts by or under "this" article; and the provision of section 1364 of "the Greater New York charter," that such court shall have jurisdiction "of a foreign corporation having an office in the city of New York," does not violate such constitutional provision, but merely confers upon the Municipal Court the jurisdiction which had been exercised for many years by the local tribunals consolidated in that court.

2. SCOPE OF CONSTITUTIONAL LIMITATION. Assuming that the Municipal Court of the city of New York is a new local court, the provision conferring upon it jurisdiction "of a foreign corporation having an office in the city of New York" would not violate section 18 of article 6 of the Constitution, since the limitation thereby imposed upon the power of the legislature to confer jurisdiction upon future inferior local courts relates to the jurisdiction as to subject-matter, and not as to territory, non-resident parties defendant or foreign corporations.

*Worthington v. London Guar. & Ac. Co.*, 47 App. Div. 609, reversed.

(Argued June 6, 1900; decided October 2, 1900.)

APPEAL, by permission, from an order and judgment of the Appellate Division of the Supreme Court in the first judicial department, entered respectively February 16 and March 3, 1900, affirming an order and judgment of the Appellate Term of the Supreme Court for said department, which reversed a judgment of the Municipal Court of the city of New York in favor of plaintiff for a sum of money due on contract.

The nature of the action, the question certified, and the facts, so far as material, are stated in the opinion.

*Robert L. Morrell* for appellant. The Municipal Court of the city of New York has jurisdiction in civil actions against a foreign corporation having an office in the city of New York. (L. 1897, ch. 378, § 1364; Const. N. Y. art. 6, § 18.) The Municipal Court of the city of New York as it exists in the borough of Manhattan is not a new local inferior court, but is a continuation of the District Courts of the city of New York. (*Matter of Schultes*, 33 App. Div. 524; *People ex rel. v. Porter*, 90 N. Y. 68; *Irwin v. M. S. Ry. Co.*, 38 App. Div. 253; L. 1897, ch. 378, § 1608.) Even if it should be held that the Municipal Court is a new local inferior court created subsequent to the Constitution of 1895, still that portion of the Greater New York charter giving it jurisdiction over foreign corporations and non-residents is constitutional and not in violation of section 18 of article 6 of the Constitution of 1895, because it was not the intention of the framers of the Constitution of 1895 to prohibit the legislature from creating a new local inferior court having at least the jurisdiction of a justice of the peace. (*Dodge Mfg. Co. v. N. S. C. Co.*, 44 App. Div. 603; *Luban v. Simonds*, 46 App. Div. 192; *Irwin v. M. S. Ry. Co.*, 38 App. Div. 261.) A foreign corporation is not "a person, not a resident of the county," within the meaning of section 14 of article 6 of the Constitution. (*Plimpton v. Bigelow*, 93 N. Y. 598.) Every reasonable method to reconcile the Municipal Court Act with the Constitution should be resorted to before the statute is declared unconstitutional. (*People ex rel. v. Bd. of Suprs.*, 147 N. Y. 1; Code Civ. Pro. § 3228.)

*Frederick Hulse* for respondent. The Municipal Court of the city of New York in which this action was brought had no jurisdiction of the defendant. (Const. of N. Y. art. 6, § 18; *Plimpton v. Bigelow*, 93 N. Y. 592; *Irwin v. M. S. Ry. Co.*, 38 App. Div. 253; *Matter of Schultes*, 33 App. Div. 524; *Tyroler v. Gummersbach*, 28 Misc. Rep. 151; *Scheich v. G. O. F. H. Assn.*, 29 Misc. Rep. 358; *McConlogue v. McCaffrey*, 29 Misc. Rep. 139; *McKenna v. F. Ins. Co.*, 28



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Misc. Rep. 173; *Rieser v. Parker*, 27 Misc. Rep. 205; *Bris-  
tor v. Flaherty*, 30 Misc. Rep. 111; *S. G. Co. v. N. S. C. Co.*,  
28 Misc. Rep. 577.)

BARTLETT, J. This action was commenced in the Municipal Court of the city of New York, borough of Manhattan, first judicial district, against the defendant, a foreign corporation, created by the laws of Great Britain, and having an office in the city of New York. The plaintiff sued to recover a sum of money alleged to be due on contract and recovered judgment. The Appellate Term reversed the judgment and the Appellate Division affirmed the order and judgment of reversal.

The only question discussed in the opinions of the appellate courts was that of jurisdiction, it being held that the Municipal Court of the city of New York had no jurisdiction of the defendant, notwithstanding the fact that "The Greater New York Charter" provides in express terms, in section 1364, that said court has jurisdiction "of a foreign corporation having an office in the city of New York," for the reason that this provision of the charter is violative of article VI, § 18, of the State Constitution, which provides that the legislature "shall not hereafter confer upon any inferior local court of its creation, any equity jurisdiction or any greater jurisdiction in other respects than is conferred upon county courts by or under this article."

The argument of the respondent is that the Municipal Court is a new, inferior, local court created by the charter, and, as the State Constitution (Art. VI, § 14) limits the jurisdiction of County Courts to residents of the county, the legislature was without power to confer jurisdiction as to defendants not residing within the limits of the present city of New York.

This view of the law has been approved by the two appellate tribunals, and a question is certified to this court by the Appellate Division reading as follows, viz. : "Has the Municipal Court of the city of New York jurisdiction to render judgment against the defendant in this cause?"

This decision has such a serious effect on the business interests of a great city containing about three millions and a half of inhabitants, that the question may well be asked whether a situation is not presented where the familiar rule of construction may be applied most rigidly, that a statute can be declared unconstitutional only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to and reconciliation has been found impossible, the statute will be upheld. (*People ex rel. Henderson v. Supervisors*, 147 N. Y. 1.)

To the charter, as to every statute, the presumption of constitutionality attaches; the burden rests upon the defendant to show it is unconstitutional.

It is well at the outset to recall the jurisdiction of inferior local courts, in the territory now embraced within the city of New York, prior to January 1st, 1898, when the greater city came into existence. The District Courts in the old city of New York, answering to Justices' Courts in the other portions of the state, had existed for nearly one hundred and fifty years, and under the Consolidation Act (§ 1283) had jurisdiction in civil actions for a limited amount of non-residents of the county and foreign corporations, provided they had an office in the city of New York. Within the limits of the old city of New York there was neither County Court nor justice of the peace.

In Brooklyn there existed courts known as Justices' Courts with non-resident jurisdiction, and in other portions of the territory now embraced within the greater city were justices of the peace and County Courts, the former having jurisdiction of defendants who were non-residents of the county and the latter confined to residents.

The old city of New York, as is well known, had a large number of non-residents who came within its limits every day to do business, and against whom numberless small claims were constantly arising in favor of residents. For time out of mind these claims had been collected in the District Courts

in the exercise of jurisdiction that greatly promoted the interests of those seeking to enforce these minor causes of action; but if the decision in the case at bar is to stand, these comparatively insignificant demands are to be litigated in the Supreme Court, and if under fifty dollars all remedy is cut off, as costs would not be recoverable in a court of record. (Code of Civ. Pro. § 3228, sub. 4.)

If this is the legal situation it is beyond legislative remedy, and must await the slow process of a constitutional amendment.

It is quite inconceivable that the legislature contemplated any such radical change, and its clear intention, in view of the growing needs of the greater city, was to continue in full force the jurisdiction over non-residents and foreign corporations as to minor claims.

It requires clear and unmistakable language to deprive the local courts of the city of New York of jurisdiction over causes of action originating within the territorial limits of the tribunal, and where the defendant, if a non-resident, is served within the boundaries of the city, or if a foreign corporation has a place of business therein. The task imposed upon the commissioners who drafted the charter of the greater city required them to unite into one great municipality the cities of New York and Brooklyn and a large number of contiguous cities, towns and villages. The student of the charter is constantly impressed with the fact that it is not a new enactment, but a continuation of the Consolidation Act of 1882 and its amendments as modified.

This principle of construction is made a part of the charter. (§ 1608.)

The general scheme of the charter was to continue in existence the old city of New York, and to a great extent its municipal and judicial machinery, and to unite with it the outlying territory, which aggregation on a day named would become the new city of New York.

This scheme being kept in mind, the details of the charter are rendered clear and harmonious.

The first step was a provision that the wards of the old city

of New York should be continued with their present boundaries and numbers and known as wards of the borough of Manhattan and the Bronx, respectively. (§ 1578.)

The provision was also made to continue the wards of the former city of Brooklyn as wards in the borough of Brooklyn. (§ 1577.)

The remaining territory which was to constitute the greater city was dealt with in a very different manner.

The five towns and all the incorporated villages within the county of Richmond were abolished and that territory became wards in the borough of Richmond in the new city. (§§ 1579, 1580.)

Certain towns and villages in the county of Queens were also abolished and the territory carved up into wards in the borough of Queens in the greater city. (§ 1581.)

This was followed by the provision that, upon the taking effect of the charter; all offices in these cities, villages, towns and school districts were abolished, except as otherwise provided. (§ 1615.) This swept out of existence with unimportant exceptions justices of the peace and all local courts.

The county of Richmond and a portion of the county of Queens came into the greater city without judicial machinery, except as provided by the new charter.

The old city of New York and the city of Brooklyn were possessed of local courts that were to be the basis of a system for the new city.

The matter of inferior local courts is dealt with in chapter XX of the charter.

The City Court of New York was continued (§ 1345), and the justices thereof were permitted to serve until the expiration of their respective terms. (§ 1346.)

From and after midnight of the thirty-first of January, 1898, the Justices' Courts and the office of justice of the peace in the cities of Brooklyn and Long Island City were abolished. (§ 1350.)

Section 1351 reads as follows: "On and after the first day of January, eighteen hundred and ninety-eight, the

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district courts of the city of New York and the justices' courts of the first, second and third districts of the city of Brooklyn are hereby *continued, consolidated and reorganized under the name* of 'The Municipal Court of the City of New York,' which said court shall be a local civil court within the city of New York, as constituted by this act, and shall not be a court of record, or have any equity jurisdiction; but shall have the jurisdiction, powers, duties and organization hereinafter prescribed."

We are of opinion that the District Courts of the old city of New York and the Justices' Courts in the three districts named in the former city of Brooklyn were not abolished, but were continued, consolidated and reorganized under a new name.

This is so, not only because it is the plain reading of the statute, but for the reason that other provisions of the charter, to which we have referred and to which we shall presently refer, make it very clear.

It is argued that the new name and a few changes as to jurisdiction create a new court.

This contention cannot be sustained. It was never supposed when the name of the Marine Court of the city of New York was changed to that of the City Court of New York, a new court was created, even when accompanied by a few changes as to jurisdiction.

In the case at bar the District Court's jurisdiction as to money limit was \$250.00, and as to territory the county of New York; to the continued, consolidated and reorganized courts, renamed the Municipal Court, is given a money limit of \$500.00 and territorial jurisdiction coterminous with the greater city.

There are other slight changes in jurisdiction not important to notice at this time. If the District Courts and others were continued, as we have held, then no new court was created and the jurisdiction over a foreign corporation defendant, having a place of business in the city of New York, survived the consolidation and reorganization. It is an impressive fact

that a portion of the language of section 1351, which continued the old courts, is taken from article VI, § 18, of the State Constitution, which section it is argued was violative of its provisions. The section adopts the constitutional limitations, evidently by reason of excessive caution, which prohibit the creation of a court of record, or a court having equity jurisdiction.

It is thus made clear that the drafter of this section had these constitutional provisions before him when he drew it.

The charter commissioners having continued, consolidated and reorganized these courts under a new name, proceeded to provide for certain details consistent with the situation. The justices of the consolidated and reorganized courts were permitted to serve out the remainder of their terms as justices of the Municipal Court. (§ 1352.)

It then remained to provide the full number of justices for the Municipal Court and indicate the districts into which the greater city should be divided.

The borough of the Bronx was constituted two districts; the borough of Manhattan eleven; the borough of Brooklyn five; the borough of Queens three, and the borough of Richmond two, making a total of twenty-three districts. (§§ 1359 to 1363.) As the justices of the continued courts in office at the time of the consolidation were not sufficient in number to provide the reorganized court with a justice in each district, the mayor of the greater city was allowed to appoint the number necessary until December 31st, 1899. (§ 1352, sub. 4.)

No one is eligible to the office of justice unless he is a resident and elector in the district for which he shall be elected or appointed, thus making the continued, consolidated and reorganized court a substitute for the inferior local courts that had either been continued and consolidated, as in the case of the old cities of New York and Brooklyn, or abolished as was the fact in the remaining territory of the greater city. (§ 1353.)

The scheme of the charter, as thus briefly outlined, leads us to the conclusion that the Municipal Court of the city of New

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York is not a new inferior local court, but old local tribunals continued, consolidated and reorganized under a new name and adapted to the needs of the greater city.

The decision of this case might very well rest on the point already discussed, that the Municipal Court of the city of New York is not a new local court; we are, however, of opinion that, assuming it to be such, there was no violation of article VI, § 18, of the State Constitution, when the legislature vested it with the same jurisdiction as to non-resident defendants and foreign corporations as had been for many years conferred on the District Courts in the city of New York, and to some extent on justices of the peace in other portions of the state.

This section of the Constitution reads as follows :

“Inferior local courts of civil and criminal jurisdiction may be established by the legislature, but no inferior local court hereafter created shall be a court of record. The legislature shall not hereafter confer upon any inferior local court of its creation, any equity jurisdiction or any greater jurisdiction in other respects than is conferred upon county courts by or under this article. \* \* \*

The object of the framers of the Constitution seems very plain. The inferior local court could be created by the legislature, but certain limitations were placed upon this power. The court so created could not be a court of record, and was clothed with a jurisdiction which confined it to locality, that is, to county, city, town and village.

In *Landers v. Staten Island R. R. Co.* (53 N. Y. 450) this court had occasion to consider article 6, § 12, of the judiciary article of the Constitution, as amended in 1869, which continued the Superior Court of the city of New York, the Court of Common Pleas of the city and county of New York, the Superior Court of Buffalo, and the City Court of Brooklyn with the powers and jurisdiction they then had, “and such further civil and criminal jurisdiction as may be conferred by law.”

It was held that legislation seeking to vest in the City

Court of Brooklyn jurisdiction of an action against a corporation for negligence as a common carrier, where the cause of action arose, the business of the corporation was transacted and its offices located outside of the city of Brooklyn, was unconstitutional, and that the words "further civil and criminal jurisdiction" had reference to the object of the jurisdiction and not to the territory or the persons of suitors. (*Vide People ex rel. Townsend v. Porter*, 90 N. Y. 68, 75.)

When the judiciary article of the Constitution of 1894 was framed this matter of limitation as to locality had been fully construed by the courts and the convention deemed it wise to place an additional restraint upon the legislature when defining the powers of inferior local courts, to be exercised within their territorial limits, and, hence, we have the provision of the Constitution already quoted, which prohibits the legislature from granting "any greater jurisdiction in other respects than is conferred upon County Courts by or under this article."

It is very clear that the framers of the Constitution intended that not only should the inferior local court be strictly confined to its locality, but that the extent of its jurisdiction should be so limited that there would be no danger of powers being conferred by the legislature that might interfere with the Supreme Court in the exercise of its general jurisdiction throughout the state.

The local court was, therefore, to have no greater jurisdiction than the County Court.

What does this reasonably mean, in view of the manifest intention of the framers of the Constitution in drafting this limitation? It prohibits, in effect, the creation of an inferior local court possessing greater powers and dignity than the County Court.

The Constitution provides (Art. 6, § 14), in dealing with County Courts, that they shall be continued and exercise the powers and jurisdiction they then possessed, and the legislature was empowered to enlarge or restrict the jurisdiction provided it should not be so extended as to authorize an action



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therein for the recovery of money only, in which the sum demanded exceeded two thousand dollars or in which any person not a resident of the county is a defendant.

This constitutional limitation as to amount discloses the intention to continue the County Court as an inferior local tribunal, notwithstanding it was a court of record. (Code of Civ. Pro. § 2, subd. 8.) The framers of the Constitution, in contemplating the creation of inferior local tribunals by the legislature and limiting its power, were not dealing with the jurisdiction of these future courts as to territory, non-resident parties defendant or foreign corporations, but as to subject-matter; they were not to have, in a general way, greater powers, importance and dignity than a County Court. In conferring upon the Municipal Court the jurisdiction of the District Courts of the city of New York and of justices of the peace elsewhere, which had been exercised for many years by these local tribunals, the legislature did not create a local court possessing greater powers, importance and dignity, within the general provisions of the Constitution we are considering, than the County Court.

The constitutionality of the charter of the city of New York in this respect is, therefore, maintainable upon both of the grounds discussed in this opinion.

We answer the question propounded to us in the affirmative.

The order and judgment of the Appellate Division appealed from should be reversed, and the order and judgment of the Appellate Term, first department, which were affirmed by the Appellate Division, should also be reversed, with costs to the plaintiff in Appellate Term, Appellate Division and in this court.

The record should be remitted to the Appellate Term, with the direction to hear and determine the appeal herein on the merits.

HAIGHT, J. I concur in the opinion of BARTLETT, J., in so far as he holds that the Municipal Court of the city of New York is a continuation of the District Court of the old city,

and is not a new local and inferior court within article 6, section 18, of the Constitution.

I am in doubt, however, with reference to his construction of that section. I am rather inclined to the view that that section of the Constitution has reference to local inferior courts established by the legislature in any part of the state and not necessarily restricted to cities, in which the power is limited to the jurisdiction conferred upon County Courts both as to persons and to subject-matter. But it appears to me that the Municipal Court of the city of New York, as it exists, is a District Court within the provisions of section 17, article 6, of the Constitution which provides that "justices of the peace and district court justices may be elected in the different cities of this state in such manner and *with such powers*, and have such terms respectively *as are or shall be* prescribed by law." Here we have a provision of the Constitution, relating to cities only, which makes provision for District Court justices, not only as to those existing, but also to such as *shall be* hereafter provided by law. As to such justices, they are to have "*such powers*" as the legislature shall provide, and there is no limitation whatever. It is true that the court in question is not called in the statute a District Court. Its name is the Municipal Court, but the change in name is immaterial. This view leaves all of the provisions of the Constitution in harmony. We have provisions establishing courts of record and then providing for justices of the peace in towns, and also for justices of the peace or District Courts in cities in which the jurisdiction of the court is left to the discretion of the legislature which has already given to such courts jurisdiction of actions of this character. Then, and in addition to this provision, authority is given to the legislature by section 18 to establish other local inferior courts of civil and criminal jurisdiction not limited to cities, but for the counties, towns and villages as well, the jurisdiction of which shall not be greater than that conferred upon County Courts.

My conclusion is that the Municipal Court is a District Court within the city of New York, authorized by section 17 of the

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Constitution referred to, and that it has such powers as the legislature has, or shall hereafter prescribe, and that under the charter of Greater New York it had jurisdiction of this cause of action.

PARKER, Ch. J., concurs on first ground; O'BRIEN, HAIGHT (in memorandum), VANN, LONDON and CULLEN, JJ., concur. Order reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. THE  
BUFFALO FISH COMPANY, Limited, Respondent:

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GAME LAW — POSSESSION OF FISH INHIBITED THEREBY DURING CLOSE SEASON. The prohibition against the possession of certain fish during the close season contained in the Fisheries, Game and Forest Law (L. 1892, ch. 488, §§ 110, 112, as amd. by L. 1896, ch. 531 and L. 1898, ch. 109) applies only to such fish as are taken from the waters of this state and not to those imported from a foreign country; and the mere possession of fish of the species inhibited, by any person within this state, during the close season, is not in itself a violation of the law, although it is *prima facie* evidence thereof and casts upon him the burden of proving facts showing his possession to be lawful.

*People v. Buffalo Fish Co.*, 45 App. Div. 631, affirmed.

(Argued May 16, 1900; decided October 2, 1900.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 29, 1899, affirming an interlocutory judgment in favor of defendant entered upon an order of Special Term overruling a demurrer to the defendant's answer.

The People brought this action to recover from the defendant, a domestic business corporation, certain penalties provided for in the provisions of the Fisheries, Game and Forest Law of 1892, as amended, for having in its possession during the close season certain fish described as pike, pickerel, bass and muskallonge. A first cause of action charged a certain violation of the provisions of section 110 of the act, which concern pike and pickerel; a second cause of action charged a further violation of the provisions of the same section

which concern bass and a third cause of action similarly charged a violation of the provisions of section 112 of the same act, which concern muskallonge. The defendant's answer admitted having the fish in its possession, as charged, and set up, by way of new matter in defense, that the fish in question were fresh water fish and were caught and killed within the provinces of Ontario and Manitoba, in the Dominion of Canada, at a time when it was lawful to catch and kill the same there; that they were there purchased by the defendant and were imported through the customs department of the United States, under the provisions of the United States tariff laws, and the fixed duty thereon paid; that the acts of the legislature of the state of New York conflicted with the acts of Congress in regulating the dealing in fish as an article of commerce, and infringed upon the interstate commerce provisions of the Federal Constitution and are unconstitutional and void, and, further, that they are violative of the provisions of the State Constitution in depriving the defendant of its property without due process of law. To the new matter alleged in the answer the plaintiff demurred, upon the ground that it "is not sufficient in law upon its face to constitute a defense." The plaintiff's demurrer was overruled at the Special Term and upon appeal to the Appellate Division, in the fourth department, the order overruling the demurrer was affirmed. The Appellate Division certified three questions: *First*. "Are the provisions of section 110 of the Fisheries, Game and Forest Law, as amended by chapter 109 of the Laws of 1898, prohibiting the possession of pike and pickerel during the close season for such fish in New York state, in conflict with any provisions of the State and Federal Constitution when applied to pike and pickerel imported from Canada, under the customs laws and regulations of the United States which have been duly complied with, or do the facts alleged in the defendant's answer constitute a defense to the first cause of action set forth in the complaint?" The second question certified is similar to the first one, except in its reference to the possession of bass during

the close season, and the third question is similar to the others, except that it relates to the possession of muskallonge during the close season, within the provisions of section 112 of the Fisheries, Game and Forest Law, as amended by chapter 531 of the Laws of 1896.

*Elon R. Brown* for appellant. The legislature has power to prohibit the possession of fish or game during the close season, as a police regulation for the better protection of fish and game, and such power is not inconsistent with the provision of the Federal Constitution in regard to interstate or foreign commerce, or the provision of the State or Federal Constitution for the protection of private rights of property. (*Phelps v. Racey*, 60 N. Y. 10; *Bellows v. Elmendorf*, 7 Lans. 462; *People v. Gerber*, 92 Hun, 554; *N. Y. Assn. v. Durham*, 19 J. & S. 306; *Lawton v. Steele*, 119 N. Y. 226; 152 U. S. 133; *People v. Doxtater*, 75 Hun, 472; *Geer v. Conn.*, 161 U. S. 519; *Organ v. State*, 56 Ark. 267; *Ex parte Maier*, 103 Cal. 476.) Limitations of property rights in fish and game have exceeded the limitations of such rights in all other chattels, because fish and game have always been held to belong to the state in trust for the people of the state. (*Organ v. State*, 56 Ark. 270; *McReady v. Virginia*, 94 U. S. 391; *State v. Beal*, 75 Me. 289; *Gentile v. State*, 29 Ind. 409, 416; *People v. Bridges*, 142 Ill. 30; *State v. Roberts*, 59 N. H. 256; *State v. Tower*, 84 Me. 444; *Commonwealth v. Manchester*, 152 Mass. 230; 139 U. S. 240; *Chambers v. Church*, 14 R. I. 398; *Allen v. Wyckoff*, 48 N. J. L. 90.)

*William L. Marcy* for respondent. The statutes in question violate and infringe upon the commerce clause of the Constitution of the United States. (Const. of U. S. art. 1, § 8; *R. R. Co. v. Husen*, 95 U. S. 465; *State Freight Tax*, 15 Wall. 232; *Ward v. Maryland*, 12 Wall. 418; *Welton v. State of Missouri*, 91 U. S. 275; *Henderson v. Mayor, etc.*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275; *Scott v. Donald*, 165 U. S. 58; *Walling v. Michigan*, 116 U. S. 446;

Opinion per O'BRIEN, J.

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*Bowman v. C. & N. W. Ry. Co.*, 125 U. S. 465; *Leisy v. Hardin*, 135 U. S. 100.) The statutes in question work a destruction of property and defendant is deprived of its property without due process of law. (*Colm v. Lisk*, 153 N. Y. 188; *Foster v. Scott*, 136 N. Y. 577; *Davidson v. New Orleans*, 96 U. S. 97; *People v. Gillson*, 109 N. Y. 389; *People v. Hawkins*, 157 N. Y. 1; *Magner v. People*, 97 Ill. 320; *Collins v. New Hampshire*, 171 U. S. 30; *Davis v. McNair*, 7 Cr. L. Jour. 213.) The effect of the determination by this court that the fish and game laws of this state are unconstitutional so far as they prohibit the possession of fish lawfully purchased in Canada and brought within the state, does not invalidate and destroy the force or effect of the Game and Fisheries Act in this or other states, but the scope of these laws is limited to fish and game caught or killed within the boundaries of the state. (*Schollenberger v. Penn.*, 171 U. S. 1; *Powell v. Penn.*, 127 U. S. 678.) The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. (*Schollenberger v. Penn.*, 171 U. S. 1.)

O'BRIEN, J. The statute of this state for the protection of fish and game forbids any person, under pain of indictment and civil penalties, to either "catch, kill or be possessed" of certain fish named during what is called the close season therein prescribed. The defendant had in its possession during that season three different kinds of fish described in the statute, and this action was brought to recover the penalties denounced against offenders for violation of the law. The defendant in its answer alleged that its business is dealing in fresh fish on an extensive scale, and for that purpose maintains stores in various cities of the state; that it purchased the fish in question from dealers in Ontario and Manitoba, in Canada, imported it into this state for sale at Buffalo under

the revenue laws of the United States, paying the duties thereon; that in so doing it was lawfully engaged in trade and commerce. The plaintiff demurred to this answer, thus admitting the facts, and insists that in law they do not constitute a defense. The courts below held that the demurrer was bad and that the facts constituted a good defense.

The appeal presents two questions: *First*, with respect to the true meaning and scope of the statute, and, *secondly*, if it means what the plaintiff insists it does, with respect to its validity. I think that the statute is valid when reasonably and fairly construed with reference to its purpose and object. It is a penal statute and, therefore, not to be enlarged by construction or applied to cases not within the intention. We all agree that the purpose was to protect fish within the waters of this state. There is absolutely no room for disagreement on that point. The legislature had no interest or purpose to protect fish in a foreign country or in some other state, and had no power in that regard. Statutes should be construed, if possible, so as to avoid absurdity and manifest injustice. (*People v. Jaehne*, 103 N. Y. 182.) They should receive such construction as to render them practicable, just and reasonably convenient. (*Rosenplaenter v. Roessle*, 54 N. Y. 262.) They should be construed to avoid, if possible, constitutional restrictions and understood in a sense within such limitations, rather than in conflict with them. (*Sage v. City of Brooklyn*, 89 N. Y. 189.) Their validity must be determined solely with reference to constitutional restrictions, and not by natural equity or justice. (*Bertholf v. O'Reilly*, 74 N. Y. 509.) The statute in question does not in terms, or by any reasonable implication, forbid a person to "catch, kill or be possessed" of fish in a foreign country. We all agree that our statute does not forbid a person to "catch or kill" fish of any kind in Manitoba, but it is said that when one brings the fish so caught or killed into this state the penalties of our statute attach to him at once. With all respect I am constrained to say that this is not a reasonable or tolerable interpretation of a penal statute. What it means and all it means is to forbid

any person to catch, kill or be possessed of the fish described from the waters of this state. The word "possessed" obviously refers to those fish the catching or killing of which is forbidden, that is to say, fish in the waters of this state, and not those procured in a foreign country. It is simply a perversion of the statute to hold that the mere possession by any person within this state of the fish described in the statute during the close season is a violation of it, without regard to the place where it was procured, or to the manner obtained. (*Commonwealth v. Hall*, 128 Mass. 410; *People v. O'Neil*, 71 Mich. 325.)

It has long been the practice with keepers of summer hotels in this state to purchase at the proper season of the year in Canada, and in other states, game in large quantities and preserve it in cold storage for use in the close season, but if this statute is to receive the narrow and literal reading contended for they are all subject to indictment and civil penalties, since they are certainly *possessed* of this game during the forbidden period. There is scarcely a county of this state in which private fish ponds are not to be found, constructed and maintained by private persons on their own land, in which fish of the species described in the statute are kept and propagated. The fish in such ponds are private property. They have been reduced to possession and are within the dominion of the owner. Is it a violation of the statute for a person to catch or kill fish from his own private pond? If it is, and the owner refrains from it during the close season, he will still violate the law, since he is *possessed* of the fish all the time, and the only way he can escape from the pains and penalties of the statute is to open the pond and let the fish out.

In the case at bar the statute is pushed by a literal reading to a point quite as unreasonable. In my opinion the law has no reference or application to a case where the fish have been imported from a foreign country. The conceded facts of this case take it out of the reason and policy of the law.

But it is argued that unless the statute is construed to inhibit the possession, during the close season, of fish



imported from a foreign country, it cannot be enforced, but will be evaded by false swearing. This means that if the summer hotel keeper, the owner of the private pond and the foreign importer, under the circumstances stated, are allowed to escape, then some one else may falsely pretend that his possession of fish during the close season was obtained in a similar manner, when in fact he is really guilty of violating the law by procuring them from the waters of the state. This argument seems to be based upon the notion that unless the innocent are convicted the guilty may escape. It assumes that in the interpretation of a penal statute, such a remote danger must be anticipated and guarded against. I think it puts rather too much faith in the potency of perjury as a defense to an honest claim, and too little in the capacity of courts and juries to distinguish truth from falsehood. When it was proposed to change the criminal law and permit an accused person to testify in his own behalf, the proposition was for a long time resisted by similar arguments. It was said that the temptation to swear falsely under such circumstances was so great that crime could never be punished if the accused was permitted to testify in his own behalf; whereas experience has shown that a person on trial for a penal offense very rarely, if ever, helps his case by falsehood. Indeed, it may be safely asserted that the new law, instead of thwarting justice, as anticipated, has been a very great aid in the enforcement of the criminal law. There is not the slightest reason for giving a strained and unnatural construction to the statute in question in order to meet such an imaginary danger. The possession of the fish or game at the forbidden season, within this state, is *prima facie* evidence that the possessor has violated the law, and the burden is then cast upon him of proving facts to show that the possession was lawful. If he has no better defense than one based on falsehood, it will be entirely safe to trust to the power of cross-examination and the intelligence of the court and jury to detect and expose it, as in offenses of much greater magnitude. The contention of the People in this case is virtually to the effect that possession in all cases,

instead of being *prima facie* proof, is conclusive, and no facts can be shown to explain or to take the case out of the statute. The accused would not even be permitted to show that he acquired the possession within the state at a time when it was perfectly lawful to do so.

But if this is what the statute means and it is to be held that the conceded facts of this case are within its penal provisions, then I think it is clearly invalid, as in conflict with the commerce clause of the Federal Constitution. In this view of the case, the question and the only question is whether a state statute can be lawfully enacted to prohibit a citizen of this state from buying fish in Canada, importing it into this state under the revenue regulations of the United States, and exposing it for sale here. There is no question at all about the competency of the states, in the exercise of the police power, to enact game laws. The question is whether such laws can be so framed as to prohibit or restrict by penal provisions the importation of an article of food in universal use. That fish is such an article of food and the subject of foreign and interstate commerce, I assume no one will deny. That the purchase of fish for food in a foreign country and its importation here for sale, as such, is a branch of foreign commerce, is too clear for discussion. That the statute in question forbids the possession, and consequently the sale here, of an important article of food, is equally clear. Upon the construction contended for, the penal provisions of the statute absolutely inhibit the possession of the property at a season of the year when it is most in demand as an article of food. That the statute operates as a restriction upon the defendant's business as an importer and dealer in fish, no one can doubt. That a statute so operating is in conflict with the exclusive power of Congress to regulate foreign commerce is not questioned, and yet the contention is made with great earnestness that this statute is perfectly valid. The reasoning upon which this conclusion is based, if I understand it, is that the state has power to pass game laws, which no one denies; that the object of this statute was to protect game in this state and

not to interfere in any way with foreign commerce, and, since the purpose that the legislature had in view was lawful and laudable, the statute is good, although, in fact, it does prohibit or restrict the importation of fresh fish as an article of food. If the legislature did not intend to restrict foreign commerce, as is asserted, then it is obvious that the statute should be read and interpreted according to that intention, in which event it would have no application to the facts of this case; but, strangely enough, it is given a meaning which imputes to the lawmakers just the contrary, since it is said that the possession of imported fish is in terms inhibited. The good intentions of the legislature will not save a state statute from condemnation when it in fact conflicts with the supreme law of the land. If it restricts the freedom of commerce, as this certainly does, then it is void, no matter what name may have been given to it, or what good purpose it was intended to promote. An act to protect game, or to promote health may be so framed and applied as to restrict or regulate traffic in some article of commerce, and when it does it is just as obnoxious as if passed for that purpose under a title expressing that very intent. It will not do to hold that the Constitution can never be violated except when the legislature intends to. It is frequently violated with the very best intentions. (*People v. Hawkins*, 157 N. Y. 1.)

I pass over the suggestion that the statute may be considered as a health law and applied as such, since the sport of fishing and hunting promotes health. The number of people that can indulge in the sport are so few, comparatively, and the number who are obliged to buy fish in the market for food so large, relatively, that a defense of the law as an agent or handmaid of the public health cannot be taken quite seriously. Reasoning of that kind enables us to deceive ourselves with names and words, but fails to prove that a law which prohibits the sale of a healthy article of food, imported from a foreign country, is a valid exercise of power. It might as well be argued that a statute prohibiting the sale or possession of intoxicating liquors imported from abroad or from another

state is not what it professes to be, but a health law in disguise, since it operates to restrain a few people from ruining their health by excessive drinking. The question in this case is not solved or advanced one step by arguments to show that the statute is a healthful exercise by the state of the police power with respect to internal objects. We must always come back to the inquiry as to its effect upon trade in an article of food, when applied to the conceded facts of this case.

The law on the question has so often been stated by the highest court of the land, in accordance with the rules already stated, that much further discussion would be out of place. I will recall only a few of the more recent cases. In *Bowman v. Chicago, etc., Railway Co.* (125 U. S. 465) it was held that a state has no power to enact laws for the purpose of protecting its people against the evils of intemperance, which, in fact, operate to regulate commerce and forbid the importation into the state of intoxicating liquors without a certificate first obtained from the state authorities that the person to whom the goods are consigned is authorized to sell liquor under the state law, although the act was passed without any purpose of affecting interstate commerce, but as a police regulation to protect the health and morals of the people. The same doctrine was repeated in a more recent case. (*Scott v. Donald*, 165 U. S. 58.) It was again held in *Leisy v. Hardin* (135 U. S. 100) that liquors are lawful subjects of commerce and a state is without power to restrict or prohibit their importation from a sister state, nor, when imported, prohibit their sale. In *Minnesota v. Barber* (136 U. S. 313) it was held that a state statute, conceded to have been passed in good faith for the protection of the public health, which forbids the sale within the state of certain meat products, unless the animals were first inspected therein before they were killed, is unconstitutional and void. The same doctrine was subsequently reaffirmed. (*Brimmer v. Rehman*, 138 U. S. 78.)

In *Schollenberger v. Pennsylvania* (171 U. S. 1) it was held that a statute of the state which forbids any person from

selling, exposing for sale or having in possession oleomargarine was invalid, in so far as it operated to prohibit the introduction of the article into the state from another state. It was admitted that all these statutes were based upon the undoubted police power of the state to protect health and morals, but the good intentions with which they were enacted did not save them from condemnation, since they operated as a regulation of, or restriction upon, interstate commerce, and so far as they had that operation they were void.

If there is any difference in principle, or any sound or reasonable distinction pertinent to the question now before us, between a statute intended to protect fish, and to foster and promote sport, or the pastime of hunting and fishing, and those to protect health by providing for an inspection of animals to be used as meat, to promote temperance and morality by forbidding the sale of liquors, or to suppress fraud by restricting the sale of imitation butter as food, I have not been able to perceive it, and I may add that no one has yet attempted to state it. If there is any distinction at all it would be against and not in support of a statute intended only to promote sport and pleasure. That is all laudable enough, but not so important to the body politic as laws to protect health, or suppress crime and promote morality; all of which have been held to be void when so framed as to regulate or restrict interstate or foreign commerce. If the statute in question has the meaning and effect claimed for it, then its operation cannot be better illustrated than by the admitted facts of this case.

It seems that had the defendant at the time it imported fish also imported meat, liquors or oleomargarine, all the latter articles would be protected from state laws restricting their sale or possession by the commerce clause of the Constitution, while the fish would be subject to the penal restrictions of the game laws. I cannot believe that this is a reasonable or tenable view of the law applicable to this case.

It will not be profitable to review or discuss the game laws of other states or countries, or the decisions of local courts interpreting the same. It may be admitted that these states

have game laws as drastic as our own, but that has no bearing on the question now before us. The learned counsel for the plaintiff has not found any authority in any state court to sustain the proposition that game laws, however framed, can be so applied as to prohibit the importation of an article of food in general use from a foreign country or another state into this state and exposing it for sale here. It must always be borne in mind that this is the only question that we are now concerned with. The statutes and decisions in other states furnish no light on this question. Indeed the strongest case that the learned counsel for the People has been able to find in favor of his contention is one decided by this court. (*Phelps v. Racey*, 60 N. Y. 10.) But it is admitted that the principle upon which that case was decided was subsequently overruled by the Supreme Court of the United States, and that upon the question now under consideration it is no longer law. (*Pierce v. New Hampshire*, 5 How. [U. S.] 504; *Leisy v. Hardin*, 135 U. S. 100, 118; *Bowman v. Chicago, etc., Ry. Co.*, 125 U. S. 507.) That case rests entirely upon the proposition that a state law regulating foreign or interstate commerce is valid unless Congress has made some regulation on the subject, a principle which has been completely overthrown by the court of last resort, as will be seen from an examination of the cases cited.

Passing from the collection of state statutes for the protection of fish and game and the decisions of state courts as to their scope and effect, which occupy such a prominent place in the brief of the learned counsel for the People, it would perhaps be unjust to his argument to ignore two cases in the Federal court which he claims support his contention in some way. If they do, they are entitled to great weight and consideration, since the decisions of that court upon this question are the supreme law of the land. If they do not, it may be safely asserted that the learned counsel has found no controlling authority to support the proposition that a state may enact a statute which makes it a penal offense for the defendant to buy fish in the markets of Manitoba or Ontario in

Canada, import it into this state and have it in his possession at Buffalo. If the court of last resort has ever said anything tending to support this proposition, even by construction or fair implication, it is doubtless authority binding upon this court. But it is very clear, I think, that it has not.

*Lawton v. Steele* (152 U. S. 133). That case decided three propositions, none of which have any relation to this case. (1) That the state had the power to regulate the manner of taking fish from waters within its jurisdiction. (2) That it had power to forbid fishing in such waters with nets. (3) That the nets destroyed in that case, being of comparatively small value, the state had power to declare them a nuisance and summarily abate them.

*Geer v. Connecticut* (161 U. S. 519). That case decides the following points: (1) That a state statute which forbids the killing of game for the purpose of conveying the same beyond the limits of the state, or having it in possession with that intent, is valid. (2) That wild game within the state belongs to the whole people in common, and that legislation to prevent its extinction by conveying it out of the state was not in conflict with the Constitution. (3) That the individual who caught or killed it within the state acquired not an absolute, but a qualified property in it, since the use or enjoyment was limited to the boundaries of the state. (4) That since the use or enjoyment was limited to the people of the state it was not the subject of foreign or interstate commerce, though it was the subject of internal commerce. (5) Not being the subject of foreign or interstate commerce, but merely of internal commerce, the statute was not in conflict with the commerce clause of the Federal Constitution.

Every proposition embraced in these two cases may be and is freely admitted, but not one of them has any bearing on this case. In the first case it was held that the state had power to forbid fishing with nets, and in order to make the prohibition effectual, to declare the nets a nuisance and destroy them summarily without liability for compensation. In the second case it was held that, inasmuch as the state owned all

the game within its limits, it might legislate to keep it there, and could forbid any one from conveying it out of the state and enforce such prohibition. But I am unable to see how all this or anything in those cases helps the plaintiff's position in this case. Here the defendant bought fish in Canada as a commercial article, where it was lawfully exposed for sale, imported it into this state under revenue laws, and had what was clearly his own property in his possession, and because he is possessed of his own property so acquired the statute in question subjects him to indictment and civil penalties. It would be difficult in this view to imagine a plainer or more direct interference with foreign commerce than this case presents.

The main proposition, after all, in support of the plaintiff's contention is based more upon policy and expediency than upon law. When fairly stated it is this : A statute to protect fish and game within the state does not protect unless it inhibits the importation of fish and game from a foreign country or another state. When this proposition is carefully examined it will be found to be not only without any foundation in fact, or in experience, but when applied to cases like the one in hand the manifest tendency is to defeat the very object of the law, which, of course, must be assumed to be protection. The individual who is permitted to hunt and fish in Canada or in another state, and bring with him here the fruits of his labor, will do very much less of hunting and fishing at home. If his warfare upon game or fish is carried on in a foreign country, or in another state, it would seem to be unwise to prevent him for the purpose of protecting fish and game at home. The game law that cuts off the supply from abroad diminishes rather than increases and protects the supply at home. Legislation that would prohibit the defendant from drawing a supply of fresh fish from Canada during the close season simply furnishes a strong temptation to procure it from the waters of this state, even in violation of law. It is said that there is a passion inherent in man to kill or capture game in spite of penal laws forbidding it. If that be so it would seem to be wisdom to allow the passion to expend itself by permit-



ting those who enjoy it to capture and become possessed of fish or game in Canada, or in other states where the law permits it, rather than furnish a temptation to violate the law at home during the close season. To forbid the taking of fish in a foreign country, or in another state where it is lawful, by our own citizens during the season, or the possession within the state of what is so taken, tends to exterminate rather than protect fish here. The legislator who would protect the forests of this state by prohibiting the importation of lumber or timber from Canada, or from other states, would be rated as a visionary theorist, but in a certain degree that is the principle upon which the argument for the People in this case proceeds for the protection of fish and game. What is true with respect to the forests is equally true of every other natural product of the soil or of the waters of the state, so that it is plain that the plaintiff's theory of this case, when put into complete operation all around the boundaries of the state would, instead of protecting fish and game, go far to exterminate both.

But all these considerations are subordinate and collateral to the main question, and when they are all weighed and examined we are brought back again to the real situation which the case presents. Admitting, for the purposes of the argument, that the statute in question means just what the plaintiff's counsel claims for it, the important fact still remains that Congress has permitted the defendant to import fresh fish upon payment of certain duties. It has paid the duties and complied with the Federal regulations, but when the article is brought here the state steps in and forbids the defendant to have it in its possession, and, of course, forbids the sale. This creates a direct conflict between the regulations of Congress and those of the state, and, consequently, the latter must yield to the former. The state had no power to extend its police legislation to such a transaction, and, of course, had no power to forbid what Congress had expressly permitted.

The case, in my opinion, was correctly decided by the courts below, and the judgment should be affirmed, with costs.

Dissenting opinion, per GRAY, J.

[Vol. 164.]

GRAY, J. (dissenting). The questions certified for our decision are questions of law, which were raised below by the demurrer to the defenses interposed in the action. They are these: Are the facts that these fish were lawfully taken in the Dominion of Canada and that they were purchased there by the defendant and by it imported into the state of New York, upon payment of the duties fixed pursuant to the United States tariff laws, a good answer to the claim of the People that the Fisheries Law has been violated by having such fish in possession and is the state statute, for inhibiting the possession during the close season of this state, in conflict with the Federal Constitution, or with the Constitution of this state?

It is not, nor can it be, seriously contended, as I think, that the law is in conflict with any of the provisions of the Constitution of the State. The case of *Phelps v. Racey*, (60 N. Y. 10), should be conclusive upon that point; whatever may be said of it upon the Federal question raised. The Federal question is whether the statute, in the particular feature in question, violates, or infringes upon, the provisions of the Constitution of the United States, which authorize Congress to regulate commerce with foreign nations and between the states. The defendant's contention upon that ground has been sustained below. The theory of Mr. Justice LAMBERT's opinion at the Trial Term, which was adopted by the justices of the Appellate Division, is, as I apprehend it, that in making unlawful the possession of property, which has been imported under the sanction of the Federal tariff laws, the enactment of those provisions of the Fisheries statute by the legislature conflicted with the power vested in Congress under the commerce clause of the Federal Constitution referred to.

It was, also, observed by the learned justice, in his opinion, that "the object of the statute is to protect the game fishes in the waters of the state, and that object is not promoted by depriving citizens of their property in fish, which have been caught and killed outside of the jurisdiction of the state, and which have become component parts of commerce, and the law cannot, therefore, be sustained as an exercise of the police power

except as it deals with those fish which may have been taken within the jurisdiction of the state." Prior to this decision of the learned court below, *Phelps v. Racey* was regarded as settling the question of the legislative power to do just what has been done in the law now attacked. That was an action which was brought under the Game Law of 1871, to recover penalties against the defendant for having in possession, contrary to the statute, certain game birds during the close season. The defense was that the defendant became possessed of them during the open season, or they were received from the states of Minnesota, or Illinois, where the killing at the time was lawful. Thus the situation was the same as in the present case; so far as it presented the legal questions. It was there held that the fact alleged that the game "was either killed within the lawful period, or brought from another state where the killing was lawful" constituted no defense; inasmuch as the penalty was denounced against the selling or possession, irrespective of the time or place of killing. The objection of a want of power in the legislature to pass the act was held to be untenable and it was said that the measures best adapted for the protection and the preservation of game "are for the legislature to determine and the courts can not review its discretion. If the regulations operate, in any respect, unjustly or oppressively, the proper remedy must be applied by that body;" and the provisions of the act, though seemingly stringent and severe, were not "foreign to the objects sought to be attained, or outside of the wide discretion vested in the legislature." In speaking of the argument that the law violated the commerce clause of the Federal Constitution, Chief Judge CHURCH deemed it unnecessary to consider "how far the exercise of the power of Congress under the provision would interfere with the authority of the state to pass game laws, and regulate and prohibit the sale and possession of game either as a sanitary measure or for its protection as an article of food. It will suffice for this case that the statute does not conflict with any law which Congress has passed on the subject." The authority of this case upon the constitu-

tional right to enact such laws has been widely recognized in the state courts, where similar statutory provisions were assailed, and, among other cases, might be cited those of *Magner v. The People*, (97 Ill. 320); *Commonwealth v. Savage*, (155 Mass. 278); *State v. Rodman*, (58 Minn. 393), and *Roth v. State*, (7 Ohio C. C. 62). In England the case of *Whitehead v. Smithers*, (L. R. [2 Com. Pl. Div.] 553), may be referred to as in point; where Chief Justice COLERIDGE observed of the act for the protection of wild fowl, passed in 1876, that "the object is to prevent British wild fowl from being improperly killed and sold under pretence of their being imported from abroad." (And see *Price v. Bradley*, L. R. [16 Q. B. Div.] 148, upon the Fresh Water Fisheries Act.)

In the court below, *Phelps v. Racey* was deemed to be no longer controlling; for the reason that its principles have been "overruled by subsequent judicial authority." The reference is to that part of the opinion which suggests the proposition that, in the absence of the enactment of a law by Congress, the states may regulate commerce among themselves. This doctrine, though supported by authority at the time, (*Pierce v. New Hampshire*, 5 How. [U. S.] 504), would seem to have been overruled by later cases, (*Leisy v. Hardin*, 135 U. S. 100; and *Schollenberger v. Pennsylvania*, 171 ib. 1); which hold that laws inhibiting the receipt of an imported commodity, or its disposition, amount essentially to a regulation of commerce with foreign nations, or among the states. I consider, however, that the Fisheries Law presents no conflict with the commerce clause of the Federal Constitution and that it is purely a governmental regulation, within the legitimate exercise of the police power of the state, relating to a matter essentially of internal policy, as affected by a common public interest. It was quite unnecessary to the decision of *Phelps v. Racey* that Chief Judge CHURCH should have expressed himself as he did upon the question of the bearing of the statute upon the commerce clause of the Federal Constitution, and it did not prevent the decision from being controlling upon the main question. There is no question of

interstate or foreign commerce, in my opinion, but, merely, one of whether, in the interest of the protection and preservation of game fishes, the legislature may not competently enact a statute so stringent in its provisions as to insure the accomplishment of the end in view ; however it might result in an apparent restriction of the liberty of the citizen. Compared with the legislation which was sustained in the grain elevator cases, (*People v. Budd*, 117 N. Y. 1, affirmed in 143 U. S. 517), where the right of the legislature to fix the maximum charge which a person might make, in his own business, for elevating grain, and to limit the charge for shoveling to the actual cost, was upheld upon the theory that the business was one which, by reason of its magnitude and character, was affected by a public interest, this statute is mild, indeed. The exercise of the police power, which is necessarily vested in the state government for the proper regulation of matters which concern the well-being and prosperity of the community, within constitutional limits, rests in the wise discretion of the legislature. When its operation is in the direction of so regulating the use of private property, or of so restraining personal action, as to secure, or to tend to, the comfort and welfare of the community, no constitutional guaranty is violated. (*People v. Ewer*, 141 N. Y. 129.) It is implied in the social compact that, in matters of public concern, the interest of the individual shall always yield to that of the public. The legislature is not the final judge as to what is a proper exercise of the police power and its acts in that direction are subject to review in the courts ; but, where a public and beneficial purpose is evident, the courts will not substitute their judgment for that of the legislative body. The remedy must be found in an appeal to the legislative wisdom.

In *Geer v. Connecticut*, (161 U. S. 519), a case arising under the Connecticut statute in relation to game birds, it was said that "the right to preserve game flows from the undoubted existence in the state of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely

and indirectly affected (citing cases). Indeed, the source of the police power as to game birds \* \* \* flows from the duty of the state to preserve for its people a valuable food supply." (Citing *Phelps v. Racey* and other cases.) In *Lawton v. Steele*, (152 U. S. 133, affirming our decision in 119 N. Y. 226), the police power of the state was discussed and it was said that "the preservation of game and fish has always been treated as within the proper domain of the police power," and that "the state may interfere whenever the public interests demand it and in this particular a larger discretion is necessarily vested in the legislature, to determine, not only what the public interests require, but what measures are necessary for the protection of such interests." (Citing cases.) "It must appear," the opinion holds "*first*, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and *second* that the measures are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals."

The object of this statute was to protect and preserve certain game fishes during the breeding season; an object, manifestly, in which the people of the state may be presumed to be more or less keenly interested and which is recognized, as Judge CHURCH observed, in all civilized countries. The purpose is to protect certain fishes within our jurisdiction, with no reference to those of other states, or countries. If they may be brought into the state within the close season here, as articles of commerce protected by United States laws and, therefore, placed beyond the reach of state laws declaring and regulating an internal policy, the result would be to facilitate evasions of the law and to make detection difficult, if not impossible. The general tendencies of human nature, it might, not inappropriately, be observed, are such as to make necessary so strict a law as to render obedience to the mandate certain. The statute aims at preventing game fishes from being unlawfully taken and exterminated, and any regulation, which tends to secure that aim, should be regarded as a legitimate and fair exercise of the police power.

Not an arbitrary, but a wise and politic purpose, is evident in this statutory regulation; touching as it does the interests of the people in a form of food supply, as in a form of sport. I cannot understand its being likened to such legislation as was condemned in *People v. Hawkins* (157 N. Y. 1). There the act required all goods made by contract labor to be labelled "convict made," when possessed and offered for sale, and it was held to be repugnant to the commerce clause of the Federal Constitution; because "a regulation of commerce by means of which the value of merchandise made in another state was to be depressed, or its sale prohibited." It was a restriction upon the freedom of commerce to permit the same articles to be put upon the market freely, if made in factories; when, if made in a prison in another state, a citizen, having lawfully purchased them, could not expose them for sale without branding or labelling them as "convict made."

Nor can I perceive that the doctrine of the oleomargarine cases is applicable. (*Schollenberger v. Pennsylvania*, 171 U. S. 1.) There is a clear distinction between legislation, which discriminates with reference to a manufactured food product, not impure nor unhealthful, and legislation, which seeks to preserve the game fishes within the waters of the state, either as a natural article of food supply, or as a form of public sport. In the one case, there is an interference with commerce, as commerce; in the other case, commerce is not aimed at, but the preservation from extermination of the People's property in game fishes. In the one case, there is interference with commercial dealing in a manufactured product, which, not unreasonably, may be said to lack justification in those ordinarily recognized principles upon which the police power of the state is properly exercised; while, in the other case, the preservation from extermination of the game fishes within the jurisdiction of the state, reasonably, commends itself as legislation in the interest of preserving to the People a valuable natural and common food supply, which is deemed in danger of being destroyed and which it is, therefore, the duty of the state to prevent by the exercise of its

undoubted police power. The *Schollenberger* case dealt with the prohibition by legislation of oleomargarine as a law "which prevents the introduction of a perfectly healthful commodity, merely for the purpose of in that way more easily preventing an adulterated and possibly injurious article from being introduced. We do not think this is a fair exercise of legislative discretion, when applied to the article in question." (Per PECKHAM, J., at p. 15.)

I think if importations may be excluded, which might affect the public health, that they may be excluded, if tending to endanger the enforcement of a law intended to protect and to preserve the People's property rights in game and fishes. There is no danger that legislative encroachments upon individual rights will be encouraged by such a decision. The presumption, which obtains in favor of the constitutionality of legislative acts, is not met here by any reasonable objection. The only, and the evident, object of the statute is to protect the game fishes mentioned during a season allowed for breeding and development and must surely be within the admitted range of the duties of state government.

It should be observed, in connection with the views expressed, that by section 190 of the Code of Civil Procedure our jurisdiction to review is confined to the questions certified. In this case, they demand of the court whether the statute they refer to is in conflict with any provision of the State, or the Federal, Constitution. Other questions are not here; which might be suggested as affecting the construction of the statute in its effect upon some exercise of private rights, in one way or another.

I think that the judgment should be reversed and that the questions certified should be answered in the negative.

PARKER, Ch. J., and LANDON, J., concur with O'BRIEN, J., and WERNER, J., concurs on first ground stated in opinion; HAIGHT and MARTIN, JJ., concur with GRAY, J., for reversal.

Judgment affirmed, and questions certified answered in the affirmative.



JAMES V. LAWRENCE, as Surviving Partner of the Firm of  
LAWRENCE BROS., Respondent, v. THE CONGREGATIONAL  
CHURCH OF GREENFIELD, L. I., Appellant.

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1. ASSIGNMENT OF MECHANIC'S LIEN—COUNTERCLAIM OR SET-OFF AVAILABLE AGAINST ASSIGNEE—EFFECT OF NEW CONTRACT BETWEEN OWNER AND ASSIGNOR. An owner, who, after the termination of the original building contract without the fault of the builder, and after the latter had commenced an action to foreclose his mechanic's lien and had assigned the lien and cause of action, but without knowledge of the assignment, entered into a new contract with the assignor with reference to the same subject-matter, is not entitled to set off against the assignee any damages arising out of the assignor's failure to perform the new contract, but is entitled to set off whatever he actually paid to the assignor, upon the assigned claim, after the assignment, in good faith and without notice.

2. WAIVER OF DEFECT OF PARTIES. A defect of parties to an action by an assignee of a mechanic's lien to foreclose the same, arising from the failure to join a prior assignee, to whose assignment plaintiff's assignment was expressly subject, is waived where the attention of the trial court is not in any manner or form directed to the point at the trial.

3. APPEAL—RIGHT TO ATTACK FINDING OF FACT AFTER UNANIMOUS AFFIRMANCE. Findings of fact by the trial court which have been unanimously affirmed by the Appellate Division cannot be questioned in the Court of Appeals as against evidence or without evidence.

4. ACTION BY ASSIGNEE OF CLAIM ASSIGNED AS COLLATERAL SECURITY—STATE OF ACCOUNTS—BURDEN OF PROOF. The assignee of a claim under a written assignment which vests the legal title in him, though as security for a debt, is not bound in an action against the debtor to prove the existence of a debt from the assignor to himself, as the state of accounts between the assignor and assignee does not concern the defendant, or, if it does, the burden is upon him to prove such a state of facts as would render the assignment inoperative or reinvest the assignor in equity with the beneficial ownership of the claim.

5. ORDER SUBSTITUTING ASSIGNEE AS PLAINTIFF—EFFECT AS AN ADJUDICATION OF RIGHT TO PROSECUTE THE ACTION. An order, made upon notice to defendant, substituting the assignee of a claim under an assignment as collateral security as plaintiff in place of the assignor is, in effect, an adjudication that the assignee has such an interest in the claim under the assignment as entitles him to prosecute the action.

*Lawrence v. Congregational Church*, 32 App. Div. 489, affirmed.

(Argued June 12, 1900 ; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered July 26, 1898, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Francis E. Dana* for appellant. There is a defect of parties. (*Hood v. Hood*, 85 N. Y. 561; *Muir v. Schenck*, 3 Hill, 228; *Bradley v. Root*, 5 Paige, 632.) The plaintiffs gave no notice to the defendant of the assignment to them of the lien or cause of action, and are bound by the subsequent acts and dealings between the defendants and Mortenson relative thereto. (Code Civ. Pro. § 1909; *Finch v. Parker*, 49 N. Y. 1; *Van Keuren v. Corkins*, 66 N. Y. 77; L. 1897, ch. 418, § 14; *Crouch v. Muller*, 141 N. Y. 495; *Newman v. Levy*, 84 Hun, 478; *Deach v. Perry*, 6 N. Y. Supp. 940; *Rapp v. Gottlieb*, 142 N. Y. 164; *Bush v. Lathrop*, 22 N. Y. 535; *Faulknor v. Swart*, 55 Hun, 261; *Huntington v. Potter*, 32 Barb. 300; *Conselyea v. Blanchard*, 103 N. Y. 222.) The contract made March 7, 1895, between Mortenson and the church was a compromise and settlement of the matters in dispute between them and by reason of Mortenson's failure to comply with its terms a defense arose in favor of defendant against Mortenson and good against his assignee before notice. (*Crane v. Knubel*, 61 N. Y. 645; *Lewis v. Tregel*, 71 Hun, 337; *Oberlies v. Bullinger*, 75 Hun, 248; *Fitzgerald v. Moran*, 141 N. Y. 419; Code Civ. Pro. § 1909; *Finch v. Parker*, 49 N. Y. 1.) The court below treated this as a counterclaim only and ignored the fact that it was a defense. (*Beckwith v. Union Bank*, 9 N. Y. 211; *Huntington v. Parker*, 32 Barb. 300; *Myers v. Davis*, 22 N. Y. 489; *Muir v. Schenck*, 3 Hill, 228.)

*Ralph E. Prime, Jr.*, for respondent. There was no defect in necessary parties to the action. (*Hilton v. Ernst*, 161 N. Y. 226; *Griffey v. N. Y. C. Ins. Co.*, 100 N. Y. 417; *Allen v. Brown*, 44 N. Y. 228; *Lang v. E. F. Ins. Co.*, 12

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App. Div. 39; *Griswold v. Caldwell*, 14 Misc. Rep. 299; *Peck v. Yorke*, 75 N. Y. 421; *Burlingame v. Parce*, 12 Hun, 149; *Tracey v. Hammond Co.*, 5 App. Div. 39; *Ridge-way v. Bacon*, 72 Hun, 211; *Hoogland v. Trask*, 6 Robt. 540; *Lawler v. Nat. Life Assn.*, 83 Hun, 393.) Respondent is not bound by the terms of the supplemental contract of March 7, 1895, between Mortenson and the defendant, so far as it purports to affect the claim and lien in suit. (*Grant v. Holden*, 1 E. D. Smith, 545.) The supplemental contract of March 7, 1895, was in no sense a settlement of any existing controversy, nor was it in law or in fact an accord and satisfaction. (*Kromer v. Heim*, 75 N. Y. 574; *Russell v. Lytle*, 6 Wend. 390; *Hawley v. Foote*, 19 Wend. 516; *Brooklyn Bank v. De Grauw*, 23 Wend. 342; *Tilton v. Alcott*, 16 Barb. 598.) The offset or counterclaim for damages for breach of the new agreement, which is pleaded, but of which not a scintilla of evidence was offered, and which the trial court has found was not proved — even if proved could not be allowed in this case as against the respondent. (*Newburger v. M. Mfg. Co.*, 10 Daly, 275; *Fera v. Wickham*, 135 N. Y. 223; *Taylor v. Mayor, etc.*, 82 N. Y. 10; *Myers v. Davis*, 22 N. Y. 489; *Patterson v. Patterson*, 59 N. Y. 574; *Jordan v. Nat. Bank*, 74 N. Y. 467.)

O'BRIEN, J. This was an action to foreclose a mechanic's lien. The plaintiff is neither the contractor, mechanic or materialman, but an assignee of the claim. Judgment was given for the plaintiff at the trial and affirmed on appeal.

The learned counsel for the defendant has presented several grounds for a reversal, but the principal one relates to certain equities which he claims existed in favor of the church against the plaintiff's assignor at the time of the assignment and which are equally available against the plaintiff in his action. This contention, however, will be answered by a statement of the facts found and which are somewhat complicated.

On July 15th, 1891, one Mortenson entered into a contract with the defendant to construct a church edifice for \$7,300,

to be completed on November 15th next thereafter. It seems that the building was not completed at this date, but that fact is not material, since the contractor continued the work after that date without objection, and the omission in this respect, if any, was presumptively waived. The contractor was proceeding with the work when, on January 14th, 1892, by a written agreement with the defendant the work was suspended on account of proceedings by the municipal authorities to open a street, which, if perfected, would require the building to be removed. The contract was thus practically terminated without any fault on the part of the contractor. It is found that there was then due and unpaid to the contractor upon the contract \$1,361. On May 10th, 1892, the contractor filed a notice of lien for the sum claimed to be due, and about a year thereafter, May 9th, 1893, he brought this action to foreclose the lien. On the 15th of December, 1894, the contractor assigned the claim, lien and cause of action to the plaintiff, subject to a prior assignment to one Niles Johnson. This paper vested the title to the claim in the plaintiff, and there were then no equities growing out of the contract which the defendant could assert against the claim. The work having been suspended by mutual agreement, on account of the street opening proceedings, the contractor was entitled to recover what had been earned on the contract, and this claim passed to the plaintiff. On March 7th, 1895, the same contractor entered into a new contract with the defendant to complete the building, for it seems that the cloud created by the street opening proceedings had in some way passed away or had been removed.

This was an independent arrangement between the defendant and the contractor after the latter had transferred the present claim to the plaintiff, and, although the church had no notice of the assignment, yet it could not by any new agreement with the contractor affect the plaintiff's rights as assignee. In this agreement it was stipulated that the lien in question was not to be affected thereby, but that no further proceedings to foreclose were to be had, and upon receiving payment

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upon the new contract the contractor was to discharge the lien in question. The contractor failed to complete the building or to perform the new contract, though he did considerable work and received some of the payments therein stipulated. It is found that the money thus received exceeded the value of the work performed by the sum of \$235.95, and this sum was applied to diminish the amount of the lien in this action.

The failure of the contractor to perform the last or new contract in full is the main or principal equity urged in behalf of the defendant to defeat the plaintiff's claim under the assignment. It will be seen that this claim against the contractor and assignor arose long after the assignment. Whatever claim accrued to the defendant under the last contract was not available as a counterclaim or set-off in this action. It not only accrued after the assignment, but after the commencement of the action. It certainly did not exist at the time of the assignment, and could not have been enforced against the contractor or assignor while the contract belonged to him. (Code, §§ 501, 502.)

This is not a case where the defendant has, without notice of the assignment, made payments in good faith to the assignor upon the assigned demand, but where a new and independent executory contract was entered into. When the defendant was allowed in this action for such sums as it paid on the new contract in excess of the value of the work performed by the contractor, it was awarded as large a measure of relief as it was entitled to. A party who takes an assignment of a claim or cause of action like this takes it subject to all equities or defenses existing between the original parties at the time of the assignment; but it does not follow that he takes it subject to any equity that may subsequently arise between them upon new and independent contracts, though they may relate to the same subject-matter. Whatever the defendant actually paid to the contractor upon this claim after the assignment, in good faith, and without notice, stands upon a different ground, and hence should be allowed, and was allowed. But the damages sustained by the defendant, if any, from failure to perform the

new contract, cannot be urged as a defense to the plaintiff's claim.

There are some other points urged in support of the appeal which may be entitled to a brief notice. (1) It is claimed that since the plaintiff's assignment was, upon its face, expressly subject to a prior one to Niles Johnson, the latter was a necessary party, and that defense has been pleaded. It may be conceded that there was in this respect a defect of parties, but the attention of the court was not in any manner or form directed to the point at the trial. No ruling was asked and the point was not even referred to in the motion for a nonsuit. The defect, if any, was, therefore, as effectually waived as if the defendant had omitted to plead it. (2) The contention is made that the notice of lien was not filed in time, but the trial court found that it was, and inasmuch as all the findings were unanimously affirmed on appeal, it is not open to the defendant to question any of them in this court as against evidence or without evidence. They must be taken as conclusive on the facts. It is quite true that if we compute the time from the date of the written agreement to suspend this work to the date of the filing of the notice, more than ninety days had elapsed; but there was some proof given to show that subsequent to the agreement the contractor did some things in and about the building which we may assume were necessary for its preservation in its unfinished state, or were the result of a tacit agreement between the parties. The dates referred to were not conclusive upon the trial court, and, in any event, in the present condition of the record, we are not permitted to inquire into the process by means of which the court arrived at the conclusion of fact that the notice was filed in time. (3) The point is also made that the assignment to the plaintiff by the contractor was as security for a debt, and that no proof of the existence of any debt was given by the plaintiff at the trial. The answer to that contention is that the plaintiff produced a written instrument which vested in him the legal title to the claim and cause of action. The state of the account between the plaintiff and his assignor did not concern the

defendant, or if it did, then the burden was upon it to establish such a state of facts as would render the assignment inoperative or reinvest the contractor in equity with the beneficial ownership of the claim. The defendant had notice of the assignment to plaintiff at least as early as November, 1896, since a motion was then made to substitute the plaintiff as owner of the claim in place of the contractor in whose name the action was originally brought. That order was made upon notice to the defendant and a hearing, and in effect was an adjudication of the fact that the plaintiff had such an interest in the claim under the assignment as entitled him to prosecute the action.

The argument of defendant's counsel is directed largely against facts found and which are to be accepted by this court as conclusive, or is based upon facts not found and which are conclusively negated by the effect of the unanimous decision.

This view of the case leads to the conclusion that the record does not present any error of law that would warrant this court in interfering with the judgment, and it must, therefore, be affirmed, with costs.

PARKER, Ch. J., BARTLETT, HAIGHT, VANN and LANDON, JJ., concur; CULLEN, J., not sitting.

Judgment affirmed.

NORA MURPHY, Respondent, v. FRANCIS H. LEGGETT et al.,  
Appellants.

1. NUISANCE — PLATFORM WHOLLY WITHIN MUNICIPAL STOOP LIMIT NOT A NUISANCE PER SE. A permanent iron platform wholly within the stoop limit prescribed by the city of New York, having steps at either end at which persons may enter the building to which it is attached, is not a nuisance *per se*.

2. REASONABLE USE OF PLATFORM A QUESTION OF FACT — WHEN USE CONSTITUTES A NUISANCE AND BECOMES THE PROXIMATE CAUSE OF INJURY. The reasonable use of such platform for the purpose of unloading goods thereon, thereby obstructing the sidewalk in front, is ordinarily a question of fact, depending upon the use being temporary and necessary, having reference to time, place and circumstances, and where it is

unreasonable it becomes a nuisance, and a person who, in seeking to avoid the obstruction, passes over the platform, slips on the muddy steps thereof and is injured, while the muddy steps are the direct, the nuisance is the proximate cause of the injury, and a recovery of damages against the party creating it will be sustained.

*Murphy v. Leggett*, 29 App. Div. 309, affirmed.

(Argued June 14, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 26, 1898, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

*Tallmadge W. Foster* for appellants. The motion to dismiss the complaint in its entirety should have been granted. The charges of nuisance and negligence were not sustained. (*Jorgensen v. Squires*, 144 N. Y. 280; *Welsh v. Wilson*, 101 N. Y. 254; *Hand v. Klinker*, 22 J. & S. 433; *Callanan v. Gilman*, 107 N. Y. 360; *O'Reilly v. L. I. R. R. Co.*, 4 App. Div. 139.) Under the circumstances under which the plaintiff went upon the platform the defendants owed her no duty in respect thereto. (*Welsh v. Wilson*, 101 N. Y. 254.) The motion to dismiss the complaint, in so far as the action is based on the alleged nuisance, should have been granted. (S. & R. on Neg. [4th ed.] § 26; 16 Am. & Eng. Ency. of Law, 436; *Lowerre v. W. U. T. Co.*, 60 N. Y. 198; *Laidlaw v. Sage*, 158 N. Y. 73.)

*Anson Burlingame Cole* for respondent. The court was right in refusing to dismiss the complaint. (*Babbage v. Powers*, 130 N. Y. 281; *Jorgensen v. Squires*, 144 N. Y. 280; *Callanan v. Gilman*, 107 N. Y. 369; *Welsh v. Wilson*, 101 N. Y. 254; *Shook v. City of Cohoes*, 108 N. Y. 648; *Flynn v. Taylor*, 127 N. Y. 596; *Hudson v. Caryl*, 44 N. Y. 553; *St. John v. Mayor, etc.*, 6 Duer, 315; Wood on Nuisances [2d ed.], §§ 250, 251; *R., etc., Co. v. B. S. Co.*, 36 N. Y. S. R. 983; *Hallock v. Schreyer*, 33 Hun, 111.) There is evidence which would warrant the jury in finding that the plat-



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form was in a slippery condition and had been that way for some time, which condition was known to the defendants. (*Nolan v. King*, 97 N. Y. 569; *O'Reilly v. L. I. R. R. Co.*, 4 App. Div. 139.) The plaintiff was free from contributory negligence. She had a right to go on the platform under the circumstances, and was not a trespasser. (*Callanan v. Gilman*, 107 N. Y. 372; *Welsh v. Wilson*, 101 N. Y. 257; *Pomfrey v. Vil. of Saratoga Springs*, 104 N. Y. 459; *Evans v. City of Utica*, 69 N. Y. 166; *Brusso v. City of Buffalo*, 90 N. Y. 679; *McGuire v. Spence*, 91 N. Y. 303; *Bullock v. Mayor, etc.*, 99 N. Y. 654.) The defendants, under the circumstances of this case, owed a duty to the plaintiff to keep the platform and steps in a reasonably safe condition for her passage. (*Cohen v. Mayor, etc.*, 113 N. Y. 532; *Flynn v. Taylor*, 127 N. Y. 596; *Hudson v. Caryl*, 44 N. Y. 553; *St. John v. Mayor, etc.*, 6 Duer, 315; *Wood on Nuisances* [2d ed.], §§ 250, 251; *Callanan v. Gilman*, 107 N. Y. 360; *R., etc., Co. v. B. S. Co.*, 36 N. Y. S. R. 988.)

HAIGHT, J. This action was brought to recover damages for a personal injury. The defendants occupied a building on West Broadway between Franklin and Varick streets in the city of New York, in which they carried on a wholesale grocery business. On the West Broadway side they had constructed a platform about five feet wide and two feet high on a level with the entrance to their store, with three steps on either end by which they could enter their building. The platform was constructed of iron and was within the stoop limit of the street.

On the 19th day of January, 1894, at about eight o'clock in the morning, the plaintiff, in company with her sister Maggie and a Miss Hare, was passing along West Broadway to her place of work. On reaching the defendants' premises she found the sidewalk blocked by two wagons or trucks, one backed across the sidewalk up against the platform, and the other backed into the gutter with skids running from the wagon to the platform across the sidewalk. The wagons were

loaded with goods and it would take about fifteen minutes to unload such wagons. Finding the sidewalk thus obstructed the plaintiff, leading, passed up the southerly steps to the platform, followed by her companions, and thence along the platform to the northerly end, at which place she slipped on some fresh mud, or other slippery substance, and fell from the top step of the platform down the remaining steps to the sidewalk, dislocating her right ankle and causing the injury for which this action was brought.

It appeared, upon the trial, that the platform had been swept that morning at seven o'clock, and whatever mud there was upon it had been tracked there by persons passing over the platform. The trial court charged the jury that the platform was not a nuisance *per se*, but submitted to the jury two questions: *First*. Were the defendants guilty of negligence, and, *second*, was the use made by the defendants of the sidewalk and platform unnecessary and not required by the exigencies of their business, and was such use unreasonable and the proximate cause of the plaintiff's injury. The jury found a verdict in favor of the plaintiff, which has been affirmed by the Appellate Division, two of the members of that court dissenting. All of the judges of the Appellate Division appear to have been of the opinion that no negligence was shown on the part of the defendants and that no recovery could be sustained upon that ground. The defendants, however, took no exception to the submission of that question to the jury, and a reversal, consequently, cannot be placed upon that ground. Some of the judges of the Appellate Division evidently reached the conclusion that the platform constructed in front of the defendants' premises was a nuisance. We do not so consider it. It is, as we have seen, a permanent structure of iron, wholly within the stoop limit, having steps at either end, at which persons may enter the building. Had the steps been in front of the platform the approach would have been similar to a thousand other places in the same city, in which no claim of a nuisance has ever been made or entertained.

We think, however, that this judgment may be sustained

upon the ground that it was a question of fact for the determination of the jury whether the use made by the defendants of their platform and the sidewalk in front was reasonable and necessary in the conduct of their business. This view was entertained by the trial judge, and he fairly submitted the question to the jury. It is true that persons engaged in business in a city have the right to use the streets and sidewalks for the purpose of unloading and loading goods that have to be taken into and from their buildings and storehouses. It is also true that highways and sidewalks may be temporarily blocked when necessary. A person engaged in constructing a large building upon a street may have to make necessary excavation for its foundation and transport to it the iron and stone used in its construction. Heavy machinery and large safes may be moved into the buildings, taking considerable time, all of which necessarily interrupts and causes inconvenience to the public in the use of the highway. The municipalities may, doubtless, provide rules or regulations controlling the manner and times in which these interruptions may be made. They must be necessary, temporary and reasonable, for no person can be permitted to permanently or unreasonably occupy the highway to the detriment of the public. The question, therefore, always is as to whether the use is necessary, temporary and reasonable. In this case the evidence tended to show that the defendants permitted trucks loaded with goods to be backed across the sidewalk so as to avoid the necessity of unloading the goods upon the walk, and then transferring them across the walk into the store. They were engaged in taking in goods from about eight o'clock in the morning until six o'clock at night. Some evidence tends to show that they received goods nearly every hour during the day, and that it took from ten to fifteen minutes to unload a truck. In the case of *Welsh v. Wilson* (101 N. Y. 254) it was held that a merchant, in removing cases of merchandise from his store, had the right to place a pair of skids from a truck across the sidewalk to the steps of his store, and that a person passing along the walk, who undertook to

pass around the skids by the steps to the door, and in so doing slipped and was injured, could not recover. In that case the walk had been occupied but two or three minutes, and it would take but two minutes more to complete the loading. It was held that the use made of the sidewalk was necessary and reasonable.

While we approve fully of the conclusion reached in that case under the facts there disclosed, it should not be understood as authorizing the practical obstruction of a street for the greater portion of the time, or as establishing a hard and fast rule which must control in all cases. Places and circumstances widely differ. That which would but slightly inconvenience the public in one place, might in another very seriously impede and discommode travelers. The use by a merchant of a back street but little traveled might be reasonable and justified, while a like use of a main thoroughfare constantly crowded with passing people would become at once unreasonable and a nuisance that could not be tolerated. Reasonable use, therefore, is ordinarily a question of fact depending upon its being temporary and necessary, having reference to time, place and circumstances. (*Callanan v. Gilman*, 107 N. Y. 360, 365.)

The proximate cause of an injury may exist without any person being liable for the injury. Liability exists where a person has created a nuisance which becomes the proximate cause, or has been guilty of negligence which contributed to the causing of the injury. A person who should run against the steps of a dwelling house and receive an injury could not recover of the owner if the steps were within the stoop line. If, however, the owner should obstruct a street so as to constitute a nuisance and a person was injured by reason thereof, a recovery could be had. In this case the plaintiff fell down the steps of the defendant's platform. The steps, therefore, with the mud thereon, became the direct cause. The defendants were under no obligation, upon any theory of negligence, to furnish her a safe passageway, but if the use of the sidewalk and platform by them was a nui-

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sance and she was injured by reason thereof, in the manner described, it constituted proximate cause. (*Cohen v. Mayor, etc.*, 113 N. Y. 532.)

We think the judgment should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, VANN and CULLEN, JJ., concur;  
BARTLETT and LANDON, JJ., dissent.

Judgment affirmed.

FRANK J. PECK, Respondent, v. DEXTER SULPHITE PULP AND  
PAPER COMPANY, Appellant.

1. MASTER AND SERVANT — AUTHORITY OF GENERAL SUPERINTENDENT TO EMPLOY FOREMAN. The general superintendent of a manufacturing company, the by-laws of which provide that he shall perform such duties as the trustees may direct, who has had the general management of affairs left to him without instructions and has hired and discharged employees, is impliedly authorized to make such ordinary contracts as custom and the necessities of the business justify or require, including the employment of a foreman for the term of one year, unless it is shown that such employment is extraordinary or unwarranted by the requirements of the business.

2. EVIDENCE — PROOF OF IMMATERIAL CIRCUMSTANCES INCOMPETENT. Upon the trial of an action by a mill foreman to recover damages for his alleged wrongful discharge from employment, evidence of the amount of defendant's dividends and profits during his employment and for the various years subsequent thereto and up to the trial, with a view of showing that the profits did not greatly vary during that time, is not competent for the purpose of contradicting defendant's testimony tending to show his incompetency, to the effect that the output of the mill, under conditions otherwise the same, greatly increased after his discharge, since the amount of defendant's profits was not material upon the question of his competency, and the reception of such evidence is reversible error.

*Peck v. Dexter S. P. & P. Co.*, 19 App. Div. 628, reversed.

(Argued June 11, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 22, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Watson M. Rogers* for appellant. The superintendent had no power to employ for a stated term. (L. 1848, ch. 40, § 7; *Smith v. C. D. Assn.*, 12 Daly, 304; *Camacho v. H. B. N. & E. Co.*, 2 App. Div. 369; *Carney v. N. Y. L. Ins. Co.*, 19 App. Div. 160; *Trustees, etc., v. Bowman*, 136 N. Y. 524; *Seymour v. Wyckoff*, 10 N. Y. 213; *Bank of Attica v. Mfg. Co.*, 17 N. Y. S. R. 386; *DeBost v. Albert Palmer Co.*, 35 Hun, 388; *Alexander v. Caldwell*, 83 N. Y. 480; *Woodruff v. R. R. R. Co.*, 108 N. Y. 39; *Wilson v. K. Co. R. R. Co.*, 114 N. Y. 492.) The incompetency of the plaintiff was such as to justify his discharge. (2 Pars. on Cont. [5th ed.] 54; *Green v. Edgar*, 21 Hun, 414; *Harrington v. F. Nat. Bank*, 1 T. & C. 361; *Willets v. Green*, 3 C. & K. 59; *Arkush v. Hannon*, 60 Hun, 518; *Dean v. Cutler*, 20 N. Y. Supp. 617; *Gray v. Shepard*, 147 N. Y. 177.) The court erred in the admission of evidence. Testimony of the wealth or poverty of the defendant, how much it earned before, at the time of or four years after plaintiff's employment, had no legitimate bearing on the questions and was incompetent and prejudicial. (*Andrews v. R., W. & O. R. R. Co.*, 54 N. Y. 334; *People v. Corey*, 148 N. Y. 486; *Barnes v. Keen*, 132 N. Y. 13; *Lipp v. Otis Bros. & Co.*, 161 N. Y. 559; *Hutchins v. Hutchins*, 98 N. Y. 56; *Williams v. Lewis*, 13 App. Div. 130; *Scattergood v. Wood*, 79 N. Y. 263; *People v. Dowling*, 84 N. Y. 478; *Niggli v. Foehry*, 83 Hun, 269; *Ward v. W. Ins. Co.*, 6 Bosw. 299.)

*Elon R. Brown* for respondent. The proof of profits of the defendant company, as drawn out on cross-examination of defendant's president and treasurer, was proper as bearing upon their credibility in testifying that Outterson had not been elected because his management was unsatisfactory. (2 Phillips on Ev. [5th ed.] 756; 1 Greenl. on Ev. § 448; *Stanley v. Pickhart*, 6 N. Y. Supp. 930.)

CULLEN, J. This action was brought, servant against master, for damages for wrongful discharge from employment.

The plaintiff alleged that he was hired as foreman of defendant's mill for the term of one year. The defendant answered denying that plaintiff's employment was for any stated period and alleging that he was properly discharged for incompetency and misconduct. The evidence tended to show an oral hiring made by one Outterson, the general superintendent of defendant's business. Objection was taken to this testimony on the ground that Outterson had no authority to employ the plaintiff for the term of one year. The objection is not well taken. Outterson had the general management of the business and hired and discharged the employees. The only provision in the by-laws of the company as to his powers was "Article XIX: The Superintendent shall perform such duties as the trustees may direct." No express directions seemed to have been given him and no restrictions placed upon his power, but the management of affairs left to him without instructions. He was, therefore, authorized to make such ordinary contracts as custom and the necessities of business would justify or require. There is nothing to show that the employment of a foreman for the term of one year was extraordinary or unwarranted by the requirements of the business and it cannot be so pronounced as a matter of law. In this respect the case differs entirely from those of *Camacho v. Hamilton Bank Note & Eng. Company* (2 App. Div. 369) and *Carney v. N. Y. Life Ins. Company* (19 App. Div. 160).

We feel constrained, however, to reverse the judgment for the improper admission of evidence. The secretary of the company, to show the incompetency of the plaintiff, testified that during the period of his employment the output of pulp from the mill averaged about nine tons a day, while at the time of the trial, with the same number of digesters and the same number of workmen, the output was about twenty-seven tons a day. In answer to this testimony the plaintiff was allowed to prove the amount of the dividends and profits of the defendant during the time of plaintiff's employment, for the various years subsequent thereto and up to the trial. It is contended that the fact that such profits did not greatly

vary during these years tended to contradict the statement of the witness that the output from the mill had been largely increased. We think it was not competent for that purpose. The profits of the business were necessarily determined by many other elements, such as the cost of the raw material, the market price of the finished product and the like, as well as by the amount of the output. It is said that this consideration only goes to the weight of the evidence and not to its competency. We think not. What the output of the mill was could readily be proved by direct evidence; that, and not the profits of the company, was the fact that was material on the question of the plaintiff's competency. That a circumstance may have some remote bearing upon the issues on trial is not sufficient to make proof of the circumstance competent and admissible. In legal trials it is necessary to confine the evidence to proof bearing directly on the issues, not only to avoid the prolixity which the opening of collateral inquiries would occasion, but also to prevent the jury from being diverted from the question to be determined by their verdict. Further, parties cannot be expected to have their evidence ready to meet such collateral matters, and, hence, much injustice would be done by their consideration. In the present case the evidence was not only incompetent to contradict the witness, but proof of the fact that for a term of years the defendant had made large profits tended to bias the jury in the plaintiff's favor.

The judgment should be reversed and a new trial granted, costs to abide the event.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN and LANDON, JJ., concur.

Judgment reversed, etc.



GERARD BENNETT et al., Respondents, v. EDISON ELECTRIC  
ILLUMINATING COMPANY OF BROOKLYN, Appellant.

SEPARATE TRIAL OF COUNTERCLAIM ALSO CONSTITUTING A DEFENSE WILL NOT BE GRANTED—CODE OF CIV. PRO. § 974. Where the answer in an action on contract alleges as a defense and also by way of a counterclaim that the agreement was to pay a certain sum instead of that stated in the contract, and that defendant's signature was procured through fraud, and demands the reformation of the contract, a motion under section 974 of the Code of Civil Procedure that the equitable issue raised by the pleadings be first tried by the court is properly denied, since the matter alleged as a counterclaim, if proved, also constitutes a defense and relieves the defendant as fully as the allowance of the counterclaim, and the provisions of that section have no application, but were intended to provide for the mode of trial of an issue arising upon a counterclaim in which the facts alleged do not constitute a defense and are not available as such.

*Bennett v. Edison El. Il. Co.*, 26 App. Div. 363, affirmed.

(Argued May 25, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered February 16, 1898, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Edward M. Shepard* and *Frank Harvey Field* for appellant. The defendant was entitled to a trial by the court of its equitable counterclaim for the reformation of the written contract. (Code Civ. Pro. §§ 969, 974; *Maher v. H. Ins. Co.*, 67 N. Y. 283; *Kilmer v. Smith*, 77 N. Y. 226; *A. C. Sav. Inst. v. Burdick*, 87 N. Y. 40; *Kirchner v. N. H. S. M. Co.*, 135 N. Y. 182; *Colville v. Chubb*, 14 N. Y. Supp. 433; *Born v. Schrenkeisen*, 110 N. Y. 55; *Post v. Moran*, 10 Daly, 502; *McClave v. Gibb*, 157 N. Y. 413.)

*Edward M. Grout* for respondents. The issue between the parties as to the contract price was properly tried. (*Walker v. Ins. Co.*, 143 N. Y. 167; Code Civ. Pro. § 975.)

HAIGHT, J. This action was brought to recover the contract price for digging two wells at the defendant's electric lighting station. The contract was in writing, and as written, the defendant agreed to pay the plaintiffs \$10 per one thousand gallons of water per day of twenty-four hours, upon completion of the wells and after their test. The answer interposed by the defendant alleged, for a defense and by way of counterclaim, that the agreement was to pay \$1.00 per thousand gallons of water furnished, instead of \$10.00 as stated in the contract, and that the signing of the contract by the defendant's superintendent was procured through false representations made with reference to the contents of the instrument and with intent on the part of the plaintiffs to defraud the defendant. The answer, among other things, demanded the reformation of the contract by the insertion therein of \$1.00 in the place of \$10.00. When the case was called for trial the defendant's counsel moved that the equitable issue raised by the pleadings be first tried by the court. This motion was denied and an exception was taken. The defendant's motion was based upon section 974 of the Code of Civil Procedure, which provides as follows: "Where the defendant interposes a counterclaim, and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact, arising thereupon, is the same, as if it arose in an action, brought by the defendant, against the plaintiff, for a cause of action stated in the counterclaim, and demanding the same judgment." In *Mackellar v. Rogers* (109 N. Y. 468, 471), DANFORTH, J., referring to the provisions of this section of the Code, says: "The conditions upon which the right depend, exist in favor of the defendant, but that right is not absolute or unqualified; it is relative and limited, and, in the words of the heading of section 974, 'within' certain 'foregoing sections' only is 'a counterclaim to be deemed an action.' We

find nothing there which required a court to sanction the course pursued by the defendant. If tolerated, it would enable a person sued to postpone and delay the plaintiff in the prosecution of a just cause until at a convenient time and before another tribunal he had presented a cause of action subsequently brought into court, and the determination of which has no necessary connection with the plaintiff's demand in suit. It would, moreover, permit him to do this after selecting a different court for the trial of his issue, and evade that trial at the moment it was to commence by the expression of his mere wish to go into a different forum, thus putting his adversary at defiance and interrupting the court in the transaction of business which he himself had in a formal manner brought before it."

We do not at this time deem it necessary to determine whether the matter alleged in the answer constitutes an equitable counterclaim. For, assuming it to be a counterclaim, the matter alleged also constitutes a defense and relieves the defendant as fully as the allowance of the counterclaim. If the signature of the defendant to the contract was procured through fraud, it was not the defendant's contract and that defense was open and available to the defendant in any action at law brought upon the contract. The provisions of the Code referred to, we think, have no application to an issue of this character, but were intended to provide for the mode of trial of an issue arising upon a counterclaim in which the facts alleged do not constitute a defense and are not available as such.

The questions of fact arising upon the trial have been finally disposed of by a unanimous affirmance of the judgment entered upon the verdict. There were some exceptions taken to the admission and rejection of evidence and to the refusal of the court to charge the jury as requested, but these exceptions, we think, were properly disposed of in the Appellate Division.

The judgment should be affirmed, with costs.

PARKER, Ch. J. (dissenting). In the view of our jurisprudence a court cannot as well and as safely as a jury decide common-law issues, while on the other hand, a jury cannot as well and as safely as a court try equitable issues. As in the former there is an absolute right to a determination by a jury, so in the latter there is a like right to a trial by the court. And a denial of such a right, when properly demanded, constitutes reversible error.

The inquiries in this case are two. The *first* is, was the defendant entitled to a trial of an issue presented by his answer before the court, and, *second*, was the demand for such a trial seasonably and properly made?

Plaintiffs sued to recover upon a written instrument the price of digging two wells. It was stated in said instrument that the plaintiffs should be paid therefor "at the uniform price of \$10 per 1,000 gallons of water furnished per day of 24 hours."

The defendant pleaded by way of defense and counterclaim that the instrument did not set forth the true agreement; that the price was to be \$1 instead of \$10 per thousand gallons; that the execution of the agreement couched in different terms than was agreed was due to the mistake of the defendant and the fraud of the plaintiffs; and, in its prayer for judgment, it asked that the agreement should be so reformed as to express the real agreement of the parties by changing the price named therein of \$10 per thousand gallons, etc., to \$1 per thousand.

The jurisdiction to reform written instruments is exclusively equitable; it has been frequently invoked; and had the action been brought by the defendant to reform the instrument, no one would think of questioning its claim of absolute right to try the case on the equity side of the court. (Code, sections 968, 969.)

Section 968 relates to issues triable by jury, and section 969 is as follows:

"An issue of law, in any action, and an issue of fact, in an action not specified in the last section, or wherein provision

for a trial by a jury is not expressly made by law, *must be tried by the court*, unless a reference or a jury trial is directed."

Whether the right remains to try such an issue before the court when it is set up in an answer by way of counterclaim in an action on the contract depends upon the provisions of section 974 of the Code, which reads as follows:

"Where the defendant interposes a counterclaim, and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact, arising thereupon, is the same, as if it arose in an action, brought by the defendant, against the plaintiff, for the cause of action stated in the counterclaim, and demanding the same judgment."

There is no room for doubt touching defendant's right under this section of the Code, for it declares that when the defendant interposes a counterclaim with a demand for affirmative judgment, "the mode of trial of an issue" thus arising is the same as if the defendant had brought an action for that purpose, and, as we have already observed, had the defendant brought an action to reform the instrument, its right to try it before the court could not have been questioned.

There is no section of the Code in conflict with the mandatory provisions of section 974; none conferring upon the court the authority to exercise its discretion. But it is suggested that the court did exercise its discretion in *Mackellar v. Rogers* (109 N. Y. 468), and an expression is quoted from the opinion indicating, possibly, that the writer would have favored more flexible legislation on the subject, but the court preserved fully the integrity of the statute and gave to its provisions full force and effect. What the court decided in that case was, not that the defendant had not once the absolute right to the mode of trial provided by section 974, but that he had waived it. That action was in equity; the defendant set up a counterclaim and demanded judgment for a sum alleged to be due for damages for the breach of the contract. Both parties noticed the cause for trial at the Special Term, and, when it was regularly called for trial, the defendant, for the first time, demanded a jury trial. It was held that he had

waived his right to a jury trial and consented to a trial by the court.

This brings us to the second question which is, whether the defendant seasonably and properly demanded its rights in the premises; for, as we have seen in the *Mackellar* case, a party may so act as to waive the right which the statute confers. Some time after the action was at issue, the defendant regularly moved the court at Special Term for a trial of the issue initiated by its counterclaim. The court denied the motion, "but without prejudice to a renewal of such application before the trial judge upon the trial hereof." From that order an appeal was promptly taken to the Appellate Division, where it was affirmed.

There was nothing left for the defendant to do but demand its right at the Trial Term, which it did. It asked not for delay, but simply that the equitable issues be first tried by the court, and that then the trial of the common-law issues proceed. The motion was denied, exceptions noted and the trial went on before the jury, who were permitted to decide the equitable as well as common-law issues in defiance of the defendant's right.

There is no room for the claim of waiver in this case, and it follows that the defendant was entitled to have allowed to it by the court the privilege conferred by the express terms of the statute.

The suggestion that "the matter alleged also constitutes a defense and relieves the defendant as fully as the allowance of the counterclaim" begs the whole question, if it be true; and it is extremely doubtful whether it is. True, the jury might have relieved the defendant by a verdict in its favor, and had they done so, their action would have shown that, by depriving defendant of its right to have a court rather than a jury pass upon the counterclaim, no practical harm had come to it. But the jury did not find in defendant's favor, and now it cannot be said that the defendant was not injured by the action of the court in refusing its statutory right of a trial of the equitable issue before the court.

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Statement of case.

The judgment should be reversed and a new trial granted, with costs to abide the event.

GRAY, MARTIN, LANDON and WERNER, JJ., concur with HAIGHT, J., for affirmance; O'BRIEN, J., concurs with PARKER, Ch. J., for reversal.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.  
JOHN C. LAMMERTS, Appellant.

1. CRIMES—EXTRA PANEL OF JURORS—SHERIFF'S RETURN. The provision of section 1174 of the Code of Civil Procedure, requiring the sheriff to make return, as prescribed in section 1048, of the persons drawn on an extra panel of jurors, applies to the form and manner of the return and not to the time, since the requirement of section 1048 is that the return be made at or before the opening of the court, which is obviously impossible in case of an extra panel drawn after the commencement of the term; and if the return is actually filed before the court overrules a challenge to the array of the extra panel it is in time.

2. CHALLENGE FOR CAUSE—FAILURE TO EXHAUST PEREMPTORY CHALLENGES. Defendant in a criminal trial is not harmed by the overruling of challenges to jurors for bias where each of such jurors was subsequently excused under a peremptory challenge and defendant did not exhaust his peremptory challenges.

3. INDICTMENT FOR GRAND LARCENY—OMISSION OF WORD "MONEY." The failure of an indictment for grand larceny, which charges that defendant had in his possession, custody and control, and unlawfully appropriated to his own use, a specified number of dollars and cents, to allege that it was in money is not a fatal defect.

4. SUFFICIENCY OF AVERMENT AS TO APPROPRIATION OF MONEY. An indictment for grand larceny of money which defendant had in his control as county treasurer sufficiently charges that he appropriated the money to the use of himself where it alleges that he "did then and there with intent to deprive the true owner of said property and of the use and benefit thereof, and to appropriate to himself \* \* \* wilfully, unlawfully and feloniously appropriate, secrete, withhold, take, steal and carry away;" since, under sections 275, 284 and 285 of the Code of Criminal Procedure, the act charged as a crime is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction according to the rights of the case, and its imperfection is in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits.

5. VARIANCE BETWEEN INDICTMENT AND PROOF. Proof that defendant, as county treasurer, drew a check upon a bank in which money of the county was on deposit subject to his order and control, personally took the same to the bank and exchanged it for a draft payable to a third person to whom he delivered it in satisfaction of a judgment against himself personally, that the draft was subsequently paid and the defendant's account as treasurer charged with the amount of the check 'is, in effect, proof of an appropriation of the money itself and is not a variance between the proof and the crime charged in the indictment.

*People v. Lammerts*, 51 App. Div. 618. affirmed.

(Argued June 12, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 5, 1900, affirming a judgment of the Niagara County Court convicting the defendant of the crime of grand larceny in the first degree, and an order denying a motion for a new trial.

The facts, so far as material, are stated in the opinion.

*Daniel E. Brong* for appellant. The trial court erred in overruling defendant's demurrer to the indictment. (1 McClain Cr. Law, §§ 592, 597; *Merwin v. People*, 26 Mich. 298; *Crocker v. State*, 47 Ala. 53; *State v. Longbottom*, 11 Humph. 39; *Barton v. State*, 29 Ark. 68; *Lavarre v. State*, 1 Tex. App. 685; *Duke v. State*, 22 Tex. App. 192.) The determination of the trial court in overruling defendant's several challenges to the jurors Hubbs, Silsby and Peterson for actual bias, presents fatal error. (*People v. Cusey*, 96 N. Y. 119; *People v. McQuade*, 110 N. Y. 301; *People v. McGonegal*, 136 N. Y. 69; *People v. Bodine*, 1 Den. 308; *Freeman v. People*, 4 Den. 31; *People v. Wilmarth*, 156 N. Y. 566; *People v. Flaherty*, 162 N. Y. 532.) The disallowance of defendant's challenge to the array of the extra panel of jurors was error and prejudicial to the defendant. (*People v. Burgess*, 153 N. Y. 561.) There is fatal variance between the allegations of the indictment and the proofs given upon the trial. (*People v. Dimick*, 107 N. Y. 13; Whart. Cr. Law, § 122; *Lancaster v. State*, 9 Tex. App. 395; *Phelps v. People*, 72



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N. Y. 333; *People v. Sanborn*, 14 N. Y. S. R. 129.) There is error in the rulings upon the reception of testimony and in the charge. (12 Conn. 279; *Corgan v. Frew*, 39 Ill. 31; *Bank v. Curry*, 2 Dana, 42; *People v. Elliott*, 5 N. Y. Cr. Rep. 213.)

*Abner T. Hopkins* for respondent. The demurrer to the indictment was properly overruled. (*People v. Helmer*, 154 N. Y. 596; *People v. Rockhill*, 74 Hun, 244; *People v. Williams*, 18 N. Y. S. R. 403; *People v. Spiegel*, 143 N. Y. 107; *People v. Clements*, 107 N. Y. 205; *Phelps v. People*, 72 N. Y. 350; *People v. Dunn*, 53 Hun, 385; *People v. Willis*, 158 N. Y. 396; *Pontius v. People*, 82 N. Y. 340.) There was no error in the overruling of defendant's challenges to jurors. (*Cox v. People*, 80 N. Y. 512; *People ex rel. v. Oyer & Ter.*, 83 N. Y. 456; *Abbott v. People*, 86 N. Y. 466; *People v. McLoughlin*, 2 App. Div. 428; *People v. Wilmarth*, 156 N. Y. 566; *People v. Carpenter*, 102 N. Y. 240.) The disposition of appellant's challenge to the array was right. (Code Crim. Pro. § 362; *People v. Burgess*, 153 N. Y. 571; *Cox v. People*, 80 N. Y. 511; *People v. Petrea*, 92 N. Y. 144; *People v. Ransom*, 7 Wend. 416; *Ferris v. People*, 35 N. Y. 125; *Friery v. People*, 2 Keyes, 453; *Gardiner v. People*, 6 Park. Cr. Rep. 200.) There was no variance between the allegations of the indictment and the proofs. (*People v. Hearne*, 10 N. Y. Cr. Rep. 191; *People v. Bork*, 16 Hun, 476; *People v. Jackson*, 8 Barb. 637; *People v. Reaves*, 38 Hun, 418; 104 N. Y. 683; *Low v. People*, 21 Park. Cr. Rep. 37; *Miller v. People*, 21 Hun, 443; *People v. Dimick*, 107 N. Y. 13; *People v. Helmer*, 154 N. Y. 596; *Marden v. Dorothy*, 160 N. Y. 39; *Reed v. McCord*, 160 N. Y. 330.)

HAIGHT, J. The indictment charged the defendant with the crime of grand larceny in the first degree, committed as follows: "The said John C. Lammerts, on or about the 13th day of April, 1898, at the city of Niagara Falls, within the county of Niagara, was then and there and at the time of the

commission of the act and acts heretofore mentioned, was a public officer, to wit: County Treasurer of the county of Niagara, and as such public officer had then and there in his possession, custody and control, two thousand five hundred forty-nine dollars and fifty cents, of the goods, chattels and personal property of the county of Niagara, of the worth and value of two thousand five hundred forty-nine dollars and fifty cents, but of what particular kind, character or denomination are to this Grand Jury unknown, and cannot by them, with reasonable diligence, be ascertained, and for that reason cannot be given, *did then and there* with intent to deprive and defraud the true owner of said property and of the use and benefit thereof, and to *appropriate to himself*, the said John C. Lammerts, and of other person or persons to this Grand Jury unknown and cannot with reasonable diligence be ascertained, and for that reason cannot be given, *wilfully, unlawfully*, and feloniously *appropriate*, secrete, withhold, take, steal and carry away, contrary to the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity." The case was tried in the County Court of Niagara county. The evidence tended to show that the defendant was the treasurer of Niagara county, and as such, had on deposit with the Power City Bank of Niagara Falls moneys belonging to the county; that on the 13th day of April, 1898, he drew his check as such treasurer on the bank for \$2,549.50, being a portion of the moneys of the county which he had on deposit and personally took the same to the bank and procured therefrom a draft on New York for that amount payable to F. L. Lovelace, attorney. This draft the defendant delivered to Lovelace in satisfaction of a judgment which had been obtained against the defendant personally for that amount. The draft was subsequently paid by the bank, and the defendant's account, as treasurer, was charged with the amount of the check.

After the case was moved for trial the defendant's counsel interposed a challenge to the array of the extra panel of jurors

drawn, upon the ground that no return had been made by the officer summoning the extra panel. It appears that the case was moved for trial on the 20th of October, and at that time the court ordered an extra panel of one hundred jurors drawn and summoned by the sheriff to attend the court on the 30th day of October, to which day the trial was adjourned. The jury box was brought into court and the names of one hundred jurors were publicly drawn therefrom pursuant to section 1058 of the Code of Civil Procedure. On the morning of the 30th, at the opening of the court, the names of the jurors drawn for the extra panel were called and those appearing answered to their names, but for some reason the sheriff did not file his return showing the manner in which each juror had been notified until some time in the afternoon of that day. Section 1048 of the Code of Civil Procedure provides that the sheriff must file the list of jurors "with the Clerk of the Court, at or before the opening of the term; with a return, endorsed thereupon, or annexed thereto, under his hand, naming each person notified, and specifying the manner in which he was notified." This section of the Code has reference to the regular panel of jurors drawn in advance of the time at which the court is appointed to be held. The extra panel of jurors in this case was drawn after the term of court had commenced, and, consequently, the return of the sheriff could not be filed at or before the opening of the term. Section 1171 of the Code makes provision for the procuring of talesmen in case a sufficient number of jurors do not appear to fill up a jury. Section 1174 requires the sheriff to notify the requisite number of such persons to attend forthwith and to make return thereof as prescribed in section 1048; but, obviously, this could not require the return to be made at or before the opening of a term of court. The provision must, therefore, be construed as applying to the form and manner of the return and not to the time. In this case the return was actually filed before the court overruled the challenge to the array, and before any juror had been selected and sworn to sit upon the trial. We think the challenge was properly overruled.

Complaint has been made with reference to the court's overruling the challenges by the defendant for bias of the jurors Hubbs, Silsby and Peterson. Each of these jurors were subsequently excused under the peremptory challenge of the defendant. He did not exhaust his peremptory challenges in securing a full panel for the trial of the case. He, therefore, suffered no harm by the rulings of the court. (*People v. Scott*, 153 N. Y. 40, 49; *People v. Larubia*, 140 N. Y. 87; *People v. Decker*, 157 N. Y. 186, 192.)

We are thus brought to a consideration of the main questions in the case, and that is whether the indictment alleges a crime, and as to whether there was a variance between the proofs and the crime charged.

It must be conceded that the indictment in this case was carelessly drawn, and that the questions raised by the demurrer interposed thereto are not free from difficulty.

Section 528 of the Penal Code defines the crime of larceny, as attempted to be charged in the indictment, as follows: "A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, either \* \* \* 2. Having in his possession, custody, or control \* \* \* as public officer \* \* \* any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof; steals such property, and is guilty of larceny." The indictment, as we have seen, charges the defendant with having committed the crime of grand larceny in the first degree on the 13th day of April, 1898, at the city of Niagara Falls, within the county of Niagara; it charges that he was the county treasurer of that county, and as such public officer had in his possession, custody and control two thousand five hundred and forty-nine dollars and fifty cents of the goods, chattels and personal property of the county of the worth and value of that sum. It does not allege that the two thousand five hundred and forty-nine dollars

and fifty cents was in money as it should have done, but rests the charge with a statement of the number of dollars and cents. We, however, are inclined to the view that this imperfection in the matter of form did not tend to prejudice the substantial rights of the defendant. Dollars and cents have a well-recognized meaning as commonly used. The common definition is, the unit of *money* by which values of commodities are measured. It is thus apparent that the defendant must have understood that he was charged with having in his possession, custody and control, money of the amount and value specified. The indictment further proceeds to charge that he "did then and there with intent to deprive the true owner of said property, and of the use and benefit thereof, and to appropriate to himself \* \* \* wilfully, unlawfully and feloniously appropriate, secrete, withhold, take, steal and carry away." It is contended that there is no allegation that the defendant did, in fact, appropriate the money to the use of himself or of another person and for that reason it does not state a crime as defined by the statute. It does, however, appear that the appropriation was made with the intent to deprive and defraud the true owner of the property and that he intended to appropriate it to himself; but it is said that the intent to appropriate it to himself does not amount to a charge that he did appropriate it to himself. A distinction may exist between the two expressions, but it is rather fine. If he did appropriate, and at the time of appropriating intended to appropriate to himself, it is a little difficult to see why it did not amount to an appropriation to himself; but however this may be, we are of the opinion that the charge is capable of but one construction, and that is that he did appropriate the money to himself. As we have seen, the appropriation was made with the intent to appropriate to himself and to deprive and defraud the true owner of the property. It is charged that the appropriation was feloniously, the meaning of which is that it was appropriated with the intent to commit a crime. It is further charged that he did withhold and steal. Steal, as defined by Webster, means to take without right, with

intent to keep. Withhold means to retain, to keep back. Appropriate is defined as "taking from another to one's self with or without violence; to take to one's self to the exclusion of others." (2 American Encyclopædia of Law [2d ed.], 516.) The appropriating of the money with the intent to deprive the owner thereof and to commit a crime, and the retaining and the keeping of it after the appropriation, in effect, is an appropriation to one's self. (Rapalje on Larceny, 502; 1 McClain on Criminal Law, section 655; *People v. Dimick*, 107 N. Y. 13.) The indictment must contain a plain and concise statement of the act constituting the crime without unnecessary repetition. It is sufficient if the act charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment upon the conviction according to the rights of the case. It is not insufficient by reason of any imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits. (Code Criminal Procedure, sections 275, 284, 285.) We, consequently, are of the opinion that the order overruling the demurrer should be sustained.

Was there a variance between the proof and the crime charged? It is contended that the evidence showed that the draft on New York, payable to Lovelace, which the defendant procured from the bank, was the property appropriated, and that such an appropriation was not charged in the indictment. We think this contention cannot be sustained. The money of the county had been deposited in the bank subject to the order and control of the county treasurer. He drew the check upon the bank as such treasurer and his check was paid. The transaction was, in effect, the same as if the cashier of the bank had paid the money over personally to him upon the check and then he had taken and passed it back to the cashier in payment for the draft. The draft, as we have seen, was made payable to Lovelace and was intended to be, and was, subsequently, delivered to him in satisfaction of a judgment which he had obtained against the defendant. It is true the defendant waived the physical handing to him of the money, but the

legal effect of the transaction was not changed by such waiver. The instant the money was paid over upon the check it became the county's money, and when the money was used in the purchase of a draft on New York to the order of Lovelace, the money was converted and appropriated to the use of the defendant. (*People v. Dimick*, 107 N. Y. 13, 32; *People v. Reavey*, 38 Hun, 418; affirmed, 104 N. Y. 683.)

We have examined the other exceptions taken upon the trial referred to by the appellant, but find none which requires a new trial.

The judgment should be affirmed.

PARKER, Ch. J., O'BRIEN, BARTLETT, VANN, LANDON and CULLEN, JJ., concur.

Judgment affirmed. \_\_\_\_\_

In the Matter of the Petition of CLARA MEEKIN, as Administratrix of LAURIE MEEKIN, Deceased, Respondent, to have Continued an Action, heretofore Pending in this Court Entitled CHARLES MEEKIN, as Administrator of LAURIE MEEKIN, Deceased, v. THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant.

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**SURVIVAL OF ACTION FOR DEATH BY NEGLIGENCE AFTER DEATH OF ADMINISTRATOR WHO WAS SOLE NEXT OF KIN OF DECEDENT.** An action brought by the sole administrator and next of kin of a decedent under section 1902 of the Code of Civil Procedure for negligently causing the death of his intestate, survives the death of such sole administrator and next of kin, and his personal representative may be substituted as plaintiff therein, since the right of action given by that section is to recover damages for wrongs done to the property, rights or interests of the beneficiaries thereof and not for injuries to the person of the decedent, and, therefore, is a property right which is not affected by the beneficiary's death but becomes a part of his estate.

*Matter of Meekin v. Bklyn. H. R. R. Co.*, 51 App. Div. 1, affirmed.

(Argued June 7, 1900; decided October 2, 1900.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, entered May 4, 1900, modifying and affirming as modi-

fied an order of Special Term reviving and continuing an action.

On the 5th of October, 1899, an action was brought by Charles Meekin, as administrator of his deceased daughter, Laurie Meekin, against the Brooklyn Heights Railroad Company, to recover damages for negligently causing her death. After issue was joined and the action had been placed on the calendar for trial. Charles Meekin died and the petitioner was appointed administratrix of his estate. Upon a petition showing the foregoing, among other facts, she applied at Special Term, on notice, for an order to revive and continue the action in her name as plaintiff. The motion was opposed, and upon the hearing it appeared that Charles Meekin was the sole next of kin of Laurie Meekin, who, however, left her mother, five brothers and six sisters her surviving. From an order granting said motion, with costs, the railroad company appealed to the Appellate Division of the second department, which affirmed the order after striking out the award of costs. Subsequently, leave to appeal from the order of affirmance was granted and the following question certified for decision: "Does an action to recover damages for negligently causing the death of his intestate survive the death of the administrator, who was also the father and sole next of kin of the deceased, where such intestate left her surviving other persons, who, had such father not survived said intestate, would have been next of kin of such deceased?"

*John L. Wells* for appellant. The cause of action abated upon the death of Charles Meekin, who, at the time of the death of Laurie Meekin, was her sole next of kin. (R. S. [9th ed.] 1907; Code Civ. Pro. §§ 1902-1904; *Mundt v. Glokner*, 24 App. Div. 110; *Hegerich v. Keddle*, 99 N. Y. 258; *Cregin v. B. C. R. R. Co.*, 75 N. Y. 194; *Wooden v. W. N. Y. & P. R. R. Co.*, 126 N. Y. 15; *Brackett v. Griswold*, 103 N. Y. 425; *Woodward v. C. & N. W. R. R. Co.*, 23 Wis. 400; *State v. B. & O. R. R. Co.*, 17 Atl. Rep. 88; *Taylor v. W. P. R. Co.*, 45 Cal. 323; *Westcott v. C. V. R. R. Co.*, 61 Vt. 438; *Harvey v. B. & O. R. R. Co.*, 70 Md. 319.)



*Isaac M. Kapper* for respondent. The statute has made the cause of action a property right, and it follows that the cause of action survived the death of the father in favor of those who, had the father not been living at the death of the intestate, would have been next of kin. (*Quin v. Moore*, 15 N. Y. 432; *Greene v. H. R. R. Co.*, 31 Barb. 260; *Pineo v. N. Y. C. & H. R. R. Co.*, 34 Hun, 80; *Cregin v. B. C. R. R. Co.*, 83 N. Y. 595; *Stephen v. Woodruff*, 18 App. Div. 625; *Furman v. Van Sise*, 56 N. Y. 435; *Keenan v. B. C. R. R. Co.*, 145 N. Y. 350.)

VANN, J. By the act of 1847, now substantially embodied in the Code of Civil Procedure, a right of action, unknown to the common law, was created, which has since been perpetuated by the Revised Constitution. (L. 1847, ch. 450; Const. art. 1, § 18. The personal representatives of a decedent who left a husband, wife or next of kin are authorized to "maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued." (Code Civ. Pro. § 1902.) The damages recovered in such an action "are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff, as if they were unbequeathed assets, left in his hands, after payment of all debts, and expenses of administration." (Id. § 1903.) "The damages awarded to the plaintiff may be such a sum as the jury \* \* \* deems to be a fair and just compensation for the *pecuniary injuries, resulting from the decedent's death, to the person or persons, for whose benefit the action is brought.*" (Id. § 1904.)

The Revised Statutes, which are modified to some extent by these provisions of the Code, authorize an executor or administrator to maintain an action "for wrongs done to the property, rights or interests of another," after his death, against the wrongdoer, and after *his* death "against his execu-

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tors or administrators in the same manner and with the like effect in all respects as actions founded upon contract." This provision, however, does not extend to actions for slander, libel, assault and battery, or false imprisonment, nor to actions "for injuries to the person of the *plaintiff* or to the person of the *testator* or *intestate* of any *executor* or *administrator*." (2 R. S. [9th ed.] 1907.)

The question, therefore, is whether the right of action created by the act of 1847 and continued by the Code of Civil Procedure, is to recover damages for wrongs done to the property rights or interests of another, or for injuries to the person of the decedent. Some confusion has arisen because the statute creates a property right out of an injury to the person, and confers it not upon the one injured but upon his representatives for the benefit of his wife and next of kin. The theory of the statute is that damages should be recovered for injuries to the estate of the beneficiaries of the action, which injuries were caused by the death of the decedent. The beneficiaries named in the statute sustain such a legal relation to the deceased by blood or marriage that it is presumed they would have been pecuniarily benefited by his continuance in life, and hence damages are allowed for a wrongful act or omission causing his death. If he had lived, the support, education or services required from him by law, as well as benefits in the nature of gifts conferred in the past, might have been continued, to the pecuniary advantage of the beneficiary. So, the decedent, by continuing to live, might increase his estate and thus increase the amount to be inherited from him upon his death in the course of nature. Hence, the statute declares that the damages awarded shall be a fair and just compensation for the *pecuniary* injuries resulting from the death, not to the person injured, but to the person for whose benefit the action is brought. While a personal injury must cause the death, damages are allowed, not for an injury to the person deceased, but for an injury to the estate of the beneficiary. The statute thus contemplates the indirect rather than the direct effect of the wrongful act. This is evident

from the well-settled law that nothing can be recovered for the pain or suffering of the deceased, if he lingers before dying, or for punitive damages, even when aggravating circumstances would warrant them if the action were between the person injured and a person inflicting the injury. The amount of damages in this class of cases depends upon the value of the reasonable expectation of pecuniary benefits from the continuance in life by the decedent to the husband or wife and next of kin. This is a right of property which becomes vested in the beneficiaries at the moment of death and can be converted into money through a statutory action brought for their benefit by the personal representatives, who are simply trustees for the purpose. (*Wooden v. W. N. Y. & P. R. R. Co.*, 126 N. Y. 10.) The damages bear interest from the date of the death, in accordance with the general rule relating to injuries to property, which is never applied in cases of injury to the person. When collected, the damages are distributed "as if they were unbequeathed assets." Thus the statute creates a right of action for damages to the estate of the beneficiaries, caused by a wrongful act or omission, which deprived them of some pecuniary benefit reasonably to be expected from the continuance in life of the decedent. That right of action was the property of the beneficiary which was not forfeited by his death, but became a part of his estate. No order of revivor would have been necessary in this case if the beneficiary had not been the sole administrator. The weight of authority is in accordance with these views, although the gradual development of the law upon the subject has resulted in some diversity of opinion. While the question was not up in one of the early cases, it was touched upon during the discussion. (*Oldfield v. N. Y. & H. R. R. Co.*, 14 N. Y. 310, 316.)

In *Quin v. Moore* (15 N. Y. 432) it was held that the interest of the beneficiary was capable of assignment, which is a test of the right to revive. In deciding the case the court said: "The interest of Mrs. Kerns was also assignable. In respect to purely personal torts, it is true. that at common law,

the right of action ceases with the life of the injured party. But in this case, although the tort was personal to the child who died, the statute comes in and declares that a right of action shall survive to the administrator. The theory of the statute is that the next of kin have a pecuniary interest in the life of the person killed, and the value of this interest is the amount for which the jury are to give their verdict. Neither the personal wrong, or outrage to the decedent, nor the pain and suffering he may have endured, are to be taken into the account. These would be the foundation of the action, and would furnish the criterion of damages, if death had not ensued, and the injured party had brought the suit. But the claim of the administrator, and through him of the next of kin, is altogether different. The statute imputes to them a direct pecuniary loss in being deprived of a life to them of greater or less value. For example, in the present case, James Kerns was a minor; his mother was, by law, entitled to his services until he should come of age; of these she was deprived by the wrongful or negligent act of the defendants, which destroyed his life. The common law gave no action for this injury. The statute, possibly with greater justice, declares a different principle, and holds the wrongdoer liable to make compensation. \* \* \* The interest which a person has in the life of another on whom he is dependent, or to whose services he is entitled, the legislature have chosen to regard as a pecuniary right; a right having the essential attributes of property, so that when it is taken away compensation is due." In a later case it was said in a dissenting opinion, written by the same judge, that these views were, in some respects, not well considered. (*Whitford v. Panama R. R. Co.*, 23 N. Y. 465, 489.) The cases must be read in connection with the statute in force at the time they arose, and hence *Dickins v. N. Y. C. R. R. Co.* (23 N. Y. 158) has no significance, because the act did not include the husband as a beneficiary.

When the *Tilley* case was first before the court it was held that there could be no recovery for the expectancy of the

children of a married woman from her earnings, because, as the law then stood, such earnings became the property of her husband as soon as realized. The question relating to the value of "probable succession" was discussed with a strong intimation that it was the proper basis of damages. (*Tilley v. Hudson R. R. Co.*, 24 N. Y. 471, 474.)

That case came before the court a second time in 29 N. Y. 252, where it was held that in an action for negligence, resulting in the death of a mother, evidence of her capacity for business and to save money, and also to bestow upon her children such training, instruction and education as would be pecuniarily serviceable to them in after life, is admissible on the question of damages. In the course of its opinion the court said with reference to these elements of damages that "It is not essential to show that they necessarily result in direct pecuniary advantage; it is sufficient that they may do so; that they often do so; that it is possible and not improbable that such may be the result, and that, therefore, these items may be set forth and presented for the consideration and deliberation of the jury, to be disposed of as they shall deem to be just." To the same effect are *McIntyre v. N. Y. C. R. R. Co.* (37 N. Y. 287, 289); *O'Mara v. H. R. R. Co.* (38 N. Y. 445), and *McGovern v. N. Y. C. & H. R. R. Co.* (67 N. Y. 417, 424).

In *Cregin v. Brooklyn Crosstown R. R. Co.* (75 N. Y. 192, 194) the court said: "The rights and interests, for tortious injuries to which this statute preserves the right of action, have frequently been considered, and it is generally conceded that they must be pecuniary rights or interests, by injuries to which the estate of the deceased is diminished." That is, by diminishing his estate, the value of the right of inheritance is diminished, and thus the beneficiaries are injured in their estate.

In *Hegerich v. Keddle* (99 N. Y. 258) it was held that the cause of action for damages from negligence resulting in death abates upon the death of the wrongdoer, and that an action cannot be maintained against his representatives. This is a

necessary result from the fact that the Code modifies the Revised Statutes and the common law only as to the personal representatives of the person injured, and not as to those of the person who inflicted the injury.

In *Littlewood v. Mayor, etc.* (89 N. Y. 24), it was held that "when one injured by the wrongful act, neglect or default of another brings suit and recovers damages for the injury in his lifetime, in case death subsequently results from the injury, his personal representatives cannot maintain an action under the Act of 1847." As a matter of course, the beneficiaries, in the absence at least of express authority from the legislature, could not have in effect a double recovery, *first*, through the settlement with the intestate and inheritance from him, and *second*, through the action under the statute.

It appears from an examination of the record in *Thomas v. Ulica & Black River R. R. Co.* (6 Civ. Pro. R. 353; 34 Hun, 626; 98 N. Y. 649) that the trial court submitted to the jury the following question upon the subject of damages: "What was the reasonable expectation of pecuniary benefit to the next of kin, by inheritance or otherwise, from the continuance in life of the deceased, worth in money?" In that case the deceased was an unmarried man who left him surviving only brothers and sisters and children of deceased brothers or sisters, and it was held in all the courts that the question submitted to the jury embraced the correct measure of damages.

So in *Keenan v. Brooklyn City R. R. Co.* (145 N. Y. 348, 350) it was said: "The jury, in determining the amount of damages that should be awarded, was in duty bound to consider the various elements of pecuniary loss sustained by the father. First, the probable earnings of the son during his minority over and above his support, clothing and education; next, the probability of his living and becoming of sufficient ability to support his father in case of his becoming aged, poor and unable to support himself; and then they had the right to consider the amount he would have brought to his next of kin while living and their prospect of inheriting

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from him after death. (*Johnson v. Long Island R. R. Co.*, 80 Hun, 306; affirmed in this court 144 N. Y. 719.)" See, also, Thomas on Negligence, 465; Sedgwick on Damages, § 572; 3 Sutherland on Damages, 282; *Terry v. Jewett*, 78 N. Y. 338; *Kellogg v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 72; *Murphy v. N. Y. C. & H. R. R. Co.*, 88 N. Y. 445; *Houghkirk v. D. & H. C. Co.*, 92 N. Y. 219; *Harlinger v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 661; *Lockwood v. N. Y., L. E. & W. R. R. Co.*, 98 N. Y. 523; *Mundt v. Glokner*, 24 App. Div. 110.

Thus it appears, both from the statute and the authorities, that the damages awarded for the negligent act are such as result to the property rights of the person or persons for whose benefit the cause of action was created. Nothing is allowed for a personal injury to the personal representatives or to the beneficiaries, but the allowance is simply for injuries to the estate of the latter caused by the wrongful act. The statute, as it has been held, is not simply remedial, but creates a new cause of action in favor of the personal representatives of the deceased, which is wholly distinct from and not a revivor of the cause of action, which, if he had survived, he would have had for his bodily injury. "Although the action can be maintained only in the cases in which it could have been brought by the deceased, if he had survived, the damages nevertheless are given upon different principles and for different causes. In an action brought by a person injured, but not fatally, by the negligence of another, he recovers for his pecuniary loss, and in addition for his pain and suffering of mind and body, while under the statute it is not the recompense which would have belonged to him, which is awarded to his personal representative, but the damages are to be estimated with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person." (*Whitford v. Panama R. R. Company, supra.*) As, in the language of the statute, "the damages awarded to the plaintiff" are to be estimated on the basis of "a fair and just compensation for the pecuniary injuries resulting from

the decedent's death to the person or persons for whose benefit the action is brought," we think the injury is for a wrong done "to the property, rights or interests" of the beneficiary, and that, hence, the cause of action survives, the recovery, if any, being a part of his estate, the same as it would have been if collected and paid over before his death.

The order appealed from should, therefore, be affirmed, with costs, and the question certified to us answered in the affirmative.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, LONDON and CULLEN, JJ., concur.

Order affirmed.

HERMAN WENDT, Plaintiff, v. WILLIAM WALSH et al.,  
Defendants.

WILLIAM S. WILSON and JOSEPH MARREN, Appellants; MARY  
F. O'GRADY and THOMAS A. WILSON, Respondents.

1. ABOLITION OF NAKED TRUST IN REAL PROPERTY BY REAL PROPERTY LAW. The grantee in a deed of absolute conveyance of real property, who executes a contemporaneous declaration of trust in favor of a third person, his heirs, administrators and assigns, declaring that he holds the property in trust for such person for his proper support and maintenance, the rents and profits to be paid to him, and promising upon his demand or that of his heirs, executors, administrators or assigns, to convey the premises to him or them by a good quitclaim deed warranting against all claiming under him (the person declaring the trust), takes a mere naked trust which is abolished by the Real Property Law (L. 1896, ch. 547, §§ 72, 73, 129); and as trustee no legal or equitable estate vests in him, but the fee vests in the person in whose favor the trust is declared.

2. APPEAL — MODIFICATION OF DECREE DISTRIBUTING SURPLUS IN FORECLOSURE PROCEEDINGS. The Court of Appeals may, upon appeal from an order of the Appellate Division reversing an order of the Special Term which confirmed the report of a referee in proceedings to distribute the surplus arising upon the foreclosure of a mortgage, modify the order by directing the payment first out of the surplus of an unpaid judgment, with interest thereon, against a decedent in whose favor a trust had been declared by a grantee of the premises, but who by virtue of sections 72, 73 and 129 of the Real Property Law took the fee, the mere naked trust being abolished



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by the statute, although the referee's findings of fact did not include the claim preferred by the judgment creditor, owing to the fact that the referee held that the decedent never had title to the property, and although the order of the Appellate Division distributed the surplus among the children of the decedent, ignoring the judgment creditor's claim.

*Wendt v. Walsh*, 49 App. Div. 184, modified.

(Argued June 7, 1900; decided October 2, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, made March 9, 1900, reversing an order of Special Term confirming the report of a referee in surplus money proceedings.

The facts, so far as material, are stated in the opinion.

*J. Wilson Bryant* for William S. Wilson, appellant. The deed to Bock has been conclusively shown to have been one of trust only, and the declaration was a valid one to the extent of and during the life of William A. Wilson. (*Van Cott v. Prentice*, 35 Hun, 317; *McArthur v. Gordon*, 126 N. Y. 597; *Hopkins v. Kent*, 145 N. Y. 363; *Roberts v. Cary*, 84 Hun, 328; *Matter of Tienken*, 131 N. Y. 391; *Tobias v. Ketchum*, 32 N. Y. 327; *Wright v. Douglass*, 7 N. Y. 564.) The trust created was only valid, and intended as a trust for the support and maintenance of William A. Wilson, and at his death it reverted and continued to remain in William S. Wilson, who has not disposed of the fee in the premises in question, and is, therefore, entitled to the whole of said surplus moneys in this proceeding. (*N. Y. D. D. Co. v. Stillman*, 30 N. Y. 174; *Downing v. Marshall*, 23 N. Y. 366; *Jackson v. Robbins*, 16 Johns. 537; *Green v. Green*, 125 N. Y. 510; *Locke v. F. L. & T. Co.*, 140 N. Y. 135; *Vernon v. Vernon*, 53 N. Y. 351; *Nearpass v. Newman*, 106 N. Y. 47.) The claim of the alleged creditor, Joseph Marren, should be disallowed on the ground that he has not shown himself entitled to a lien on the surplus moneys or the property in question and that the same was never charged with the lien of the judgment. (*F. Nat. Bank v. Hamilton*, 149 N. Y. 587; *Kane v. Larkin*, 131 N. Y. 300.)

*John H. Rogan* and *James Kearney* for Joseph Marren, appellant. A person who has purchased and paid for land, or who for any reason is entitled to a deed, is the owner, although no deed has been given, and a judgment against the party having only a record or legal title would not attach as a lien. (*Ellis v. Tousey*, 1 Paige, 280; *Dwight v. Newell*, 3 N. Y. 185; *Siemon v. Schurck*, 29 N. Y. 598; *Moyer v. Hinman*, 13 N. Y. 191; *Lounsbury v. Purdy*, 11 Barb. 480.) William A. Wilson in his lifetime and his heirs after his death were the owners of the property in question and entitled to a deed. (*La Grange v. L'Amoureux*, 1 Barb. Ch. 18; *Rawson v. Lampman*, 5 N. Y. 460; *Wright v. Douglass*, 7 N. Y. 564.) It is the duty of the court to provide for the equitable distribution of surplus moneys. (*M. L. Ins. Co. v. Bowen*, 47 Barb. 622; *Livingston v. Mildrum*, 19 N. Y. 440; *Culver v. Wright*, 22 N. Y. 472; *Sherman v. Jenkins*, 70 Hun, 503.)

*John C. Shaw* for respondents. The appellant William S. Wilson had no estate, either legal, equitable or reversionary, in the property out of which the surplus fund arose after his agreement of settlement with his father, dated February 3, 1897. (*La Grange v. L'Amoureux*, 1 Barb. Ch. 18; *Purdy v. Wright*, 44 Hun, 239; *Weeks v. Cornwell*, 104 N. Y. 325; *Welsh v. Allen*, 21 Wend. 147; *Ring v. McCoun*, 10 N. Y. 268; *Van Dusen v. Presb. Congregation*, 3 Keyes, 550; *Rawson v. Lampman*, 5 N. Y. 468.)

BARTLETT, J. This is an action to foreclose a mortgage upon real property in the city of New York. The mortgaged premises, with other lands, were conveyed to William S. Wilson either by Bridget Walsh or her heirs at law. William A. Wilson, the father of the grantee in these conveyances, brought suit against his son, claiming that all the property embraced in the deeds from Mrs. Walsh or her heirs was held by his son in trust for him.

An agreement was reached in that action before trial which

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resulted in a compromise between the father and son, wherein the son covenanted "to convey and transfer to a trustee, to be hereafter selected by said William A. Wilson, by warranty deed the following property for the sole use and benefit of said William A. Wilson, the plaintiff." The property affected by this agreement embraced the mortgaged premises.

The son executed to his father on February 11th, 1897, a power of attorney, whereby he constituted and appointed the latter his true and lawful attorney, as follows: "For me and in my name, place and stead to enter into and take possession of all my real estate described as follows:" (the property affected embraced mortgaged premises), \* \* \* "to sell and convey to any person or persons whomsoever, at such times and at such sums or prices and on such terms as to him shall seem fitting and proper."

Then follow provisions that authorized the father to execute good and sufficient deeds and contracts and instruments of any kind necessary to effect and perform his duties as attorney in fact; also to lease the land or any part thereof prior to sale; also to build upon said premises and do and perform all and every act and thing as fully as William S. Wilson might or could do. The power of attorney closed with the following language: "And further this is a continuing power, and it is irrevocable, unchangeable and unlimited and not subject to countermand or cancellation."

In pursuance of the agreement between father and son and under this power of attorney, the son on the 1st day of March, 1897, executed an absolute conveyance of the property to one Nicholas Bock, and the latter gave a declaration of trust, which after reciting the conveyance, provided as follows: "Now know ye all that I, the said Nicholas Bock, do hereby acknowledge, testify and declare that the name of me, the said grantee in the said indenture of even date herewith, is used only in trust for him, the said William A. Wilson, his heirs, administrators and assigns, and that I hold the same in trust for the said William A. Wilson for his proper support and maintenance, and the rents and profits thereof are to be

paid in equal monthly payments to said William A. Wilson, and I, my heirs and assigns, etc., shal' at all times hereafter, upon the request and demand of said William A. Wilson, or his heirs, executors, administrators or assigns, convey and assure unto him, the said William A. Wilson, his heirs and assigns, the premises mentioned, etc., by a good quit claim deed, warranting against all claiming under me the premises mentioned or any part or parcel thereof and bargained and sold to me by deed above mentioned, and all the interests therein that are so conveyed to me and any part thereof."

William A. Wilson, the father, died August 7th, 1898, leaving the title in this condition.

Final judgment in foreclosure was entered on the 19th day of January, 1899, and the sale resulted in a surplus of \$2,052.57. In this proceeding there are four claimants of the surplus. William A. Wilson, deceased, the father, left him surviving three children, two sons, William S. and Thomas A., and a daughter, Mary F. O'Grady.

William S. Wilson claims the entire surplus; Thomas and Mary claim that William S. is only entitled to one third, and they should receive the other two-thirds.

Joseph Marren, a judgment creditor in the sum of \$1,809.45, claims that he is entitled to have his judgment first satisfied out of the surplus moneys.

The referee appointed in this proceeding found that William S. Wilson, the son, was entitled to the entire surplus. The Special Term affirmed the order of the referee. The Appellate Division reversed the Special Term and decided that the three children of William A. Wilson, to wit, William S. Wilson, Thomas A. Wilson and Mary F. O'Grady were entitled to share the surplus equally.

The referee did not allude in his report to the claim of the judgment creditor, and the Appellate Division dealt with it in a manner to which reference will be made later.

The decision of the Appellate Division was not unanimous, Mr. Justice McLAUGHLIN being of opinion that the judgment creditor had a first lien on the surplus moneys.

N. Y. Rep.]      Opinion of the Court, per BARTLETT, J.

The first question presented is, where was the title to the mortgaged premises, in law, at the time of the death of William A. Wilson, the father.

The statutes bearing upon this situation read as follows, viz. :  
“Every person, who, by virtue of any grant, assignment or devise, is entitled both to the actual possession of real property, and to the receipt of the rents and profits thereof, in law or equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest.” (Real Property Law [L. 1896, ch. 547], § 72; 1 R. S. page 727; 3 Birdseye’s Stat. p. 2611, § 72. See, also, *LaGrange v. L’Amoureux*, 1 Barb. Ch. 18; *Rawson v. Lampman*, 5 N. Y. 456; *Wright v. Douglass*, 7 N. Y. 564.)

Section 73 of the Real Property Law reads in part as follows: “Every disposition of real property, whether by deed or by devise, shall be made directly to the person in whom the right to the possession and profits is intended to be vested, and not to another for the use of, or in trust for, such person; and if made to any person to the use of, or in trust for another, no estate or interest, legal or equitable, vests in the trustee. \* \* \*” (3 Birdseye’s R. S. p. 2611.)

Section 129 of the Real Property Law reads as follows: “Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers and encumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts.” (3 Birdseye’s Statutes, p. 2622.)

The legal situation on the undisputed evidence is this: William S. Wilson, the son, conveyed to Bock in supposed trust for William A. Wilson, the father, and Bock executed a declaration of trust which must be read into the deed. These instruments taken together show William A. Wilson, the father, entitled to the receipt of the rents and profits and to the absolute fee of the premises; it follows that the fee is in

him under the statutes cited. Bock took a mere naked trust, which was abolished by the Revised Statutes, and as trustee no legal or equitable estate vested in him; no trust term was defined save at the pleasure of the beneficiary.

The father, William A. Wilson, having been vested with the fee of the mortgaged premises on March 1st, 1897, and dying seized of the same August 7th, 1898, it remains to consider the claim of Joseph Marren, the judgment creditor.

As before stated, the referee, upon whom was imposed the duty of ascertaining who were the proper claimants of the surplus moneys, failed to pass upon the claim of the judgment creditor, notwithstanding the fact that the latter had duly proved his judgment against the father, William A. Wilson, for \$1,809.45, recovered November 29th, 1890, and that it had not been paid. The Special Term overruled all exceptions to the report of the referee and confirmed the same, thereby giving the surplus moneys to the son, William S. Wilson. The Appellate Division reversed this order of confirmation, denied the motion to confirm the report of the referee, and sustained the exceptions thereto filed by the respective appellants.

Among the exceptions thus sustained were those of the judgment creditor.

The Appellate Division then proceeded to determine for itself the mixed question of law and fact as to who were entitled to the surplus moneys and decided that the three children of the father, William A. Wilson, should share the same equally.

The judgment creditor has appealed from that order.

The notice filed by the judgment creditor, of his lien upon the surplus moneys, states that he claims "that the successive deeds or titles to the said mortgaged premises claimed or held by the defendants respectively \* \* \* were and are and each of them is fraudulent and void as to the creditors of said judgment debtor, William A. Wilson. \* \* \*"

It was proved at the trial that the judgment creditor had begun a suit in equity to have these deeds and titles declared

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fraudulent and void. The complaint in the suit and a demurrer thereto were read in evidence before the referee, but it was not proved that the case was ever tried.

The learned Appellate Division in its opinion referred to the fact that the judgment creditor claimed enough of the surplus moneys to pay his judgment, and that he alleged the ground of his claim to be that the conveyances on which the other defendants relied were fraudulent and void, and that the record did not show he had sustained this contention.

It is possible that the attorney for the judgment creditor alleged in the claim filed grounds for sustaining the same that were untenable and afterwards abandoned at the hearing before the referee; he seems to have finally rested upon his proof of the judgment and that it had not been paid.

The suggestion that the referee made findings of fact which did not include the judgment creditor's claim is of no importance, as the Appellate Division refused to confirm the report of the referee, reversed the order of the Special Term that did confirm it, and found that the three children of the father, William A. Wilson, were entitled to the surplus moneys.

It is furthermore apparent that the referee failed to make any reference to the judgment creditor's claim for the reason that he must have held that William S. Wilson, the son, had a reversionary interest in the property conveyed to Bock in trust for his father. That theory of the case proceeded on the assumption that the father never had title to the property and the judgment creditor of the latter was without standing in court.

It is difficult to understand how the children of William A. Wilson can take the surplus moneys, under the decision of the Appellate Division, in preference to a judgment creditor of their father who has proved his judgment and the fact it has not been paid. The judgment creditor duly excepted to the report of the referee; his exceptions were sustained, the report set aside, the motion to confirm it denied and the order confirming it reversed.

The Appellate Division then proceeded to make an order

disposing of the questions of fact and law without regard to the report of the referee, and the judgment creditor has appealed therefrom and stands here with his claim proved.

The order of the Appellate Division appealed from should be modified so as to direct the payment first of the judgment and interest of defendant Joseph Marren out of the surplus moneys, and the distribution of the balance, if any there be, equally among the three children of William A. Wilson, named in said order.

As so modified the order is affirmed, with costs to the appellant Joseph Marren against the defendants William S. Wilson, Thomas A. Wilson and Mary F. O'Grady.

PARKER, Ch. J., O'BRIEN, HAIGHT, VANN, LANDON and CULLEN, JJ., concur.

Ordered accordingly.

ELMER STAHL, Appellant, v. CLARENCE M. ROOF, Respondent.

GAME LAW — SECTION 246 APPLICABLE ONLY TO CRIMINAL OFFENSES. Section 246 of the Game Law (L. 1892, ch. 488), providing that any magistrate having criminal jurisdiction, on proof by affidavit that any of the provisions of that statute have been violated by any persons temporarily within his jurisdiction, but not residing there permanently, or by any person whose name and residence are unknown, shall issue his warrant for the arrest of such offender and cause him to be committed to bail to answer the charge against him, applies only to criminal offenses under the statute, and does not authorize the arrest of a person charged with its violation by trespassing and fishing upon a private park established thereunder where the statute imposes only exemplary damages in addition to actual damages for such violation and no provision thereof made such trespass criminal at the time of his arrest.

*Stahl v. Roof*, 25 App. Div. 822, reversed.

(Argued June 4, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 18, 1898, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Circuit.



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N. Y. Rep.] Opinion of the Court, per CULLEN, J.

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The nature of the action and the facts, so far as material, are stated in the opinion.

*Wm. D. Brinnier* and *Alvah S. Newcomb* for appellant. The arrest of plaintiff and his detention under the alleged warrant against him were illegal for the reason that no crime under the common law or the statutes of the state of New York was charged in the information. (L. 1892, ch. 488, §§ 215, 217; 23 Am. & Eng. Ency. of Law, 375, 378; *People v. Hall*, 8 App. Div. 15.)

*A. H. Van Buren* for respondent. The facts alleged in the complaint presented to the justice did not constitute a misdemeanor, but they did authorize the issuing of a warrant of arrest. (L. 1862, ch. 474, §§ 19, 20, 21; L. 1864, ch. 288; L. 1867, ch. 898; L. 1868, ch. 785; L. 1869, ch. 909; L. 1871, ch. 721; L. 1877, ch. 411; L. 1879, ch. 534.)

CULLEN, J. On the 8th day of June, 1892, the plaintiff was arrested under a warrant issued by the police justice of the town of Saugerties, upon the complaint of the defendant, by which the plaintiff was charged with violating section 215 of chapter 488 of the Laws of 1892, known as the Game Law, in trespassing on the private park of the defendant and taking fish therefrom. On June 11th the plaintiff was brought before the county judge of Ulster county on a writ of habeas corpus and application was made for his discharge on the ground that no offense was charged in the warrant. The application was denied and the plaintiff remanded to custody. On June 13th he was tried before a jury and acquitted of the charge made against him. Thereafter he brought this action for damages for such arrest, and the complaint charged, though not in separate counts, both false imprisonment and malicious prosecution. At the close of the evidence on the part of the plaintiff the complaint was dismissed and a judgment entered on that dismissal was affirmed by the Appellate Division by a divided court.

The arrest of the plaintiff was illegal and the cause of action

for false imprisonment was clearly made out. Article IX of the Game Law (sections 210 to 217) forbids trespassing on private grounds for the purpose of hunting or fishing where the owner of such grounds posts and maintains certain notices required by the article. Section 217 provides: "Violations of the provisions of this article subject the person violating to exemplary damages in amount not more than twenty-five dollars for each violation in addition to the actual damages sustained by the owner or lessee." No provision of the statute, as it existed at the time of the plaintiff's arrest, made such trespass criminal or subjected the trespasser to other penalty than that quoted. This is conceded by the learned counsel for the respondent and was so held by the courts below. The justification of the plaintiff's arrest is based on section 246 of the statute, which provides that any justice of the peace, police justice or magistrate having criminal jurisdiction, on proof by affidavit that any of the provisions of the statute has been violated by any persons temporarily within his jurisdiction, but not residing there permanently, or by any person whose name and residence are unknown, shall issue his warrant for the arrest of such offender and cause him to be committed or held to bail to answer the charge against him. It is contended that under this section the magistrate was authorized to arrest the plaintiff and commit him or hold him to bail to answer any liability to the defendant, though such liability could only be asserted and enforced in a civil action. We think this view erroneous. By the Game Law many acts are made misdemeanors and subject to criminal prosecutions, while other acts subject the offender to penalties to be enforced in civil actions either by the People or by the private person aggrieved. Article X of the statute deals with the subject of prosecutions; the first part of the article (sections 230 to 242) regulates civil prosecutions for penalties; the remainder of the article is devoted to criminal proceedings. Section 243 authorizes the arrest by any protector or peace officer of a person committing a misdemeanor under the provisions of the act. Section 244 provides what courts shall

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have jurisdiction to try such offenders. Section 245 prescribes the punishment that may be imposed upon conviction of a misdemeanor under the provisions of the statute. Then is found section 246, already quoted. Section 247 authorizes the issue of a search warrant by any magistrate having criminal jurisdiction. The place in the statute where section 246 is found and the rule *noscitur a sociis* determine the proper construction of the section and show that it was intended to apply only to criminal offenses. The other interpretation would produce most anomalous and oppressive results. Where a defendant is arrested in a civil action the plaintiff is required to give an undertaking to indemnify the defendant in case the arrest be determined to be improper or the action result in his favor. If the defendant makes no defense and is in custody, judgment must be entered against him and execution against his person issued within specified periods of time so that he may not be indefinitely detained under mesne process. In the case of arrest on a criminal charge the right to a speedy examination and trial is secured by statute. But, if the doctrine which has hitherto obtained in this case is to prevail, for how long or until what time is a defendant arrested under section 246 for an offense which subjects him to a civil prosecution to be committed? What requirement is there that the prosecutor shall institute his action and serve the defendant with process within any prescribed time? It is entirely impracticable to engraft this procedure for summary arrest by a criminal magistrate upon a civil action, and we are clear that the legislature had no such intent.

The judgment should be reversed and a new trial ordered, costs to abide the event.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT and VANN, JJ., concur; LONDON, J., not sitting.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THOMAS J. PERCIVAL, Respondent, v. J. SERGEANT CRAM et al., Commissioners of Docks and Ferries of the City of New York, Appellants.

1. CIVIL SERVICE — NEW YORK CITY — SUMMARY REMOVAL OF EMPLOYEES. Employees transferred to departments of the city of New York pursuant to section 1536 of the Greater New York charter (L. 1897, ch. 378), who were not subject to removal, without cause, before the transfer, are given the same security of tenure they previously enjoyed, but employees who, before the transfer, were removable at the pleasure of the appointing power may be discharged without cause by the head of the department to which they have been transferred.

2. DOCKMASTERS ARE PUBLIC OFFICERS. Dockmasters in the department of docks in the city of New York are public officers and not merely clerks or employees, since the captain and harbor masters of the port, to whose functions they succeeded, were unquestionably public officers, and dockmasters are recognized as officers by section 848 of the charter providing that a dockmaster "shall not appoint any deputy, or assistant, or delegate the powers of his office to any person or persons whatever."

3. VALIDITY OF RULE PROHIBITING SUMMARY REMOVALS. Rule 42 of the regulations of the municipal civil service commission of the city of New York, forbidding the removal of any person in the classified service until a statement of the causes of removal has been filed with the commission and a copy of the same furnished to the person sought to be removed, and until such person has been afforded an opportunity to present an explanation in writing, is invalid, so far as it applies to a public officer, *e. g.*, a dockmaster in the department of docks, whose term is not prescribed, since article 10, section 3, of the Constitution provides that when the duration of an office is not provided by the Constitution, it may be declared by law, and if not so declared shall be held during the pleasure of the authority making the appointment; and, assuming that such was the statutory intent, the legislature cannot delegate its power to prescribe the duration of term and permanence of tenure of public officers to the civil service commission, nor can the term of an office be prescribed by its regulation.

*People ex rel. Percival v. Cram*, 50 App. Div. 381, reversed.

(Argued June 5, 1900; decided October 2, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered

April 19, 1900, affirming an order of Special Term granting a peremptory writ of mandamus requiring the defendants to reinstate the relator in the position of dockmaster in the department of docks and ferries of the city of New York.

The facts, so far as material, are stated in the opinion.

*John Whalen, Corporation Counsel* (*William J. Carr* of counsel), for appellants. The commissioners of docks and ferries of the city of New York had power under the provisions of the Greater New York charter to remove the relator at their pleasure. (L. 1897, ch. 378, § 1536; *People ex rel. v. Robb*, 126 N. Y. 180; Const. N. Y. art. 10, § 3; *People ex rel. v. Van Wyck*, 157 N. Y. 495.) Rule 42 of the civil service commission, so far as it attempts to restrict a statutory right of removal, is void. (Cooley on Const. Lim. [5th ed.] 139, 241; *Rice v. Ebele*, 55 N. Y. 519; *Glenney v. Stedwell*, 64 N. Y. 122; *French v. Powers*, 80 N. Y. 147; *Gormerly v. McGlynn*, 84 N. Y. 284; *People ex rel. v. Grant*, 37 N. Y. S. R. 630; *People ex rel. v. Dalton*, 23 Misc. Rep. 296; 31 App. Div. 630; *People ex rel. v. Henry*, 47 App. Div. 133.)

*Joseph A. Burr* for respondent. The attempted dismissal of the relator was in violation of the provisions of the Greater New York charter, inasmuch as it was not for a cause shown after a hearing had. (L. 1897, ch. 378, §§ 127, 1536, 1543; *People ex rel. v. Fire Comrs.*, 72 N. Y. 445; *People ex rel. v. Fire Comrs.*, 73 N. Y. 440; *People ex rel. v. Thompson*, 94 N. Y. 451; *People ex rel. v. La Grange*, 2 App. Div. 444.) If the removal of the relator in this proceeding was not in violation of the provisions of the charter, it was in violation of rule 42 of the civil service rules. (L. 1899, ch. 370)

CULLEN, J. The relator at the time of the consolidation of the two cities was serving as a superintendent of docks in the office of the comptroller of the city of Brooklyn. Under the plan formulated by the mayors of the two cities and the county officers in the other consolidated territory, as pre-

scribed by section 1536 of the Greater New York Charter (Chap. 378, Laws of 1897), he was transferred to service in the comptroller's office in the city of New York. There was an error in this plan of transfer, for under the charter of the consolidated city the control of the docks did not fall within the department of the comptroller. An amended plan of transfer was thereafter made by which the relator was assigned as dockmaster in the department of docks. Subsequently the relator was summarily discharged by the commissioners of the department of docks without a hearing. Thereupon he instituted this proceeding for reinstatement, claiming that his discharge was illegal, as in violation of the provisions of section 1536 of the charter and also of rule 42 of the regulations of the municipal civil service commission of the city of New York. The Special Term granted the writ as prayed for, and its order was affirmed by the Appellate Division by a divided court.

There is some confusion in the provisions of section 1536. The section begins: "All the clerical and other subordinate forces, including janitors of public schools, not subject to removal without cause, in the public employ in any part of the city of New York, as constituted by this act, at the time when this act takes effect, shall continue to hold their respective positions without prejudice or advantage, except that nothing in this section contained shall operate to keep in the service of the city of New York, as constituted by this act, any clerk or other subordinate whose position is vacated by reason of the passage of this act, and except that the clerks and subordinates of departments that are abolished or reconstructed by this act, under the same or under other names, shall continue in the service of the said city under the jurisdiction of the appropriate department subject nevertheless to removal in accordance with the provisions of this act for cause, or to abolish unnecessary positions." Then follows the direction for the adoption of a detailed plan of transfer of clerks and subordinates already referred to. The section then proceeds: "The head of every department, and every other

officer by this act given power to appoint, remove and fix and regulate the salaries of his subordinates, appointees and employees, shall have power upon assuming office, or at any time thereafter, to remove any person assigned to service under him by said plan, and to fix and regulate, within the limits of his appropriation and subject to the restrictions, if any, hereinbefore prescribed, the salaries and compensation of said subordinates, appointees and employees." It is contended that under this section a clerk or subordinate transferred to a department can be removed only for cause and that the latter provision which in terms purports to bestow upon the head of the department an unqualified right of removal must be regarded as limited by the previous provisions, that such removal can only be made for cause. We think this argument is based on a failure to appreciate the distinction between two separate classes of transferred subordinates, the status of which at the time of consolidation was radically different. In the city of Brooklyn, as in most, if not all the other cities of the state, clerks and subordinates who were veterans of the war, or veteran volunteer firemen, held their places during good behavior and could be discharged only for cause, or when their positions were properly abolished for reasons of economy. Other clerks might be discharged at the will of the appointing power. It was necessary in the charter to deal with the status of both classes of subordinates after the transfer. Bearing in mind the distinction between the two classes, the apparent inconsistency in the terms of the section disappears. Transferred employees, not subject to removal without cause, are given the same security of tenure they previously enjoyed. Other subordinates were to continue as before, removable at the pleasure of the appointing power. There is nothing in the relator's papers to show that he was a veteran soldier or fireman, or that for any other reason he had before the consolidation a permanent tenure of his place.

The civil service rule invoked by the relator reads: "To secure compliance with the provisions of the Civil Service Law prohibiting removals because of political opinions or

affiliations, no removal of any person in the classified service of the city of New York shall be valid unless and until a statement of the causes of such removal shall be filed with the Municipal Commission and a copy of the same furnished to the person sought to be removed, and until such person has been afforded an opportunity to present an explanation in writing." This regulation is claimed by the learned counsel for the appellants to be invalid as beyond the power of the commissioners to prescribe. Mr. Justice BARTLETT, in the Appellate Division, took this view and held the regulation void for reasons stated in his opinion. Whether the rule be good or bad in the case of clerks and employees, we need not determine, for in our opinion the relator was neither, but a public officer. By sections 847 and 848 of the charter the offices of captain of the port of New York and of the harbor masters of the port were abolished, and in the dockmasters appointed by the board of docks were vested all the powers and duties thitherto performed by such officers. The captain and the harbor masters of the port were unquestionably public officers, not employees. In section 848 it is provided that a dockmaster "shall not appoint any deputy, or assistant, or delegate the powers of his office to any person or persons whatever." In view of the fact that the predecessors of the dockmasters were public officers and that the statute expressly refers to the position of the latter as an office, we are of opinion that such persons are public officers.

Section 3, article X of the Constitution provides that "When the duration of any office is not provided by this Constitution, it may be declared by law, and if not so declared, such office shall be held during the pleasure of the authority making the appointment." The charter prescribes no term for the office of dockmaster, but by section 1543 substantially re-enacts the constitutional provision by directing that the heads of all departments, except as otherwise specially provided, shall have the power to appoint and remove all chiefs of bureaus, clerks, officers, employees and subordinates in their respective departments. It follows that the relator's term



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falls within the express provision of the Constitution cited and that the commissioners of the dock department had the unqualified power of removal. We concede the power of the legislature to prescribe that the term of an office shall be during good behavior and that an officer can be removed only after a hearing or trial. There is no question in our minds as to the validity of the so-called veteran laws as applied to public officers as well as to mere clerks or employees. But in the case of public officers such duration of term and permanence of tenure must proceed from the action of the legislature itself, for so the Constitution ordains. The power cannot be delegated to the civil service commission (if we assume that such was the statutory intent) nor the term of an office be prescribed by its regulation.

The order appealed from should be reversed and the motion denied, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN and LANDON, JJ., concur.

Order reversed, etc. \_\_\_\_\_

LEWIS E. CARPENTER, Respondent, v. JOHN TAYLOR,  
Appellant.

1. EVIDENCE—PAROL EVIDENCE TO SUSTAIN AGREEMENT FOR EXTRA COMPENSATION TO ASSIGNEE FOR CREDITORS. Parol proof tending to show that the extra compensation to an assignee for creditors, stipulated for in a writing executed by the assignor after the assignment, was reasonable or proper, is wholly inadmissible in determining whether the agreement to pay the extra compensation is valid in its general scope and purpose, since the law impressed upon the paper, as soon as it was made and delivered, a legal character which followed it for all time without regard to the opinion which the assignee or his witnesses had with respect to its operation, whether fair and reasonable or otherwise.

2. AGREEMENT VOID FOR WANT OF CONSIDERATION. An agreement between an assignor and assignee for creditors, subsequent to the execution of the assignment, for the payment of extra compensation to the assignee, is void for want of consideration where the only consideration claimed is the obligation of the assignee to administer the trust to the best of his knowledge, skill and ability, since he was already bound to do that.

3. AGREEMENT INVALID AS AGAINST PUBLIC POLICY. Such an agreement is invalid on the ground of public policy, since the disability of a trustee to bargain with the beneficiary for a share or interest in the property, whether in the form of compensation or otherwise, is absolute in order to avoid the possibility of fraud.

4. ASSIGNEE FOR CREDITORS IS WITHIN PROHIBITION AGAINST RECEIVING GREATER COMPENSATION THAN ALLOWED BY LAW — CODE OF CIV. PRO. § 3280. An assignee for creditors is within section 3280 of the Code of Civil Procedure, forbidding an officer or other person, to whom a fee or other compensation is allowed by law for any service, to charge or receive a greater fee or reward for that service than is so allowed, and, therefore, an agreement to pay such extra compensation creates no binding obligation.

*Carpenter v. Taylor*, 28 App. Div. 622, reversed.

(Argued June 15, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 4, 1898, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*John D. Teller* for appellant. The complaint should have been dismissed for the reason that there was no consideration to support the agreement to pay the plaintiff more than his legal fees. (2 Pars. on Cont. 437; *Bartlett v. Wyman*, 14 Johns. 260; *Geer v. Archer*, 2 Barb. 420; Pollock's Prin. of Cont. 161; *Crosby v. Wood*, 6 N. Y. 369; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Robinson v. Jewett*, 116 N. Y. 40; *McDonald v. Neilson*, 2 Cow. 139; *Willey v. Robinson*, 32 N. Y. Supp. 1018; *Lechowitzer v. H. A. P. Co.*, 28 N. Y. Supp. 577; *Seybolt v. N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 562; *Deobald v. Oppermann*, 111 N. Y. 541.) If there was such a consideration for the agreement, as adopted by the trial court, it was against public policy and void. (*Dunham v. Waterman*, 17 N. Y. 9; *Burdick v. Post*, 6 N. Y. 522; *Nicholson v. Leavitt*, 6 N. Y. 510; *Schlussel v. Willett*, 34 Barb. 615; *Goodrich v. Downs*, 6 Hill, 438; 2 N. Y. 365;

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Points of counsel.

*Van Nest v. Yoe*, 1 Sandf. Ch. 4; *Mead v. Phillips*, 1 Sandf. Ch. 83; *Planck v. Schermerhorn*, 3 Barb. Ch. 644; *Cook v. Smith*, 3 Sandf. Ch. 333; *Rapalee v. Stewart*, 27 N. Y. 310.) The court should refuse to enforce the contract in question for the reason that it is made illegal by statute. (Code Civ. Pro. § 3280; *Hatch v. Mann*, 15 Wend. 44; *White v. Madison*, 26 N. Y. 127; *Moss v. Cohen*, 158 N. Y. 248; *Crofut v. Brandt*, 58 N. Y. 111; *Parker v. Newland*, 1 Hill, 87; *McCarthy v. Bonynges*, 12 Daly, 356; 101 N. Y. 668; *United States v. Shoemaker*, 7 Wall. 338; *Oscanyan v. Arms Co.*, 103 U. S. 261; *Harvey v. Tama County*, 53 Iowa, 234; *Fawcett v. Woodbury Co.*, 55 Iowa, 154.) The court erred in admitting parol evidence to vary the written contract upon which plaintiff's claim is based. (*Thorpe v. Ross*, 4 Abb. Ct. App. Dec. 416; *Thomas v. Hunt*, 3 Keyes, 590; *Renard v. Sampson*, 12 N. Y. 561.)

*Robert L. Drummond* for respondent. The rights of creditors having been protected, the assignor was competent to enter into an agreement to pay the assignee a sum in addition to the fees allowed by statute. Having made such an agreement he cannot, after having received its benefits, be permitted to disregard it. (*Collier v. Munn*, 41 N. Y. 143; *Matter of Tilden*, 44 Hun, 441; *Meacham v. Stearnes*, 9 Paige, 398; *Griffin v. Barney*, 2 N. Y. 365; *Nichols v. McEwen*, 17 N. Y. 22; *Matter of Schell*, 53 N. Y. 263; *Matter of Hulbert*, 89 N. Y. 259; *Boezler v. Eppeley*, 40 Hun, 523; *Matter of Friend*, 23 Misc. Rep. 300.) The contract in question was not illegal under the common law, neither is it made illegal by statute. (*Moss v. Cohen*, 158 N. Y. 248; *B. G. L. Co. v. Claffy*, 151 N. Y. 24; *Bissell v. M. S. & N. I. R. R. Co.*, 22 N. Y. 258.) The agreement in question has been wholly executed by the respondent, and the appellant is estopped from disputing its validity. (*McCann v. O'Brien*, 40 App. Div. 193; *W. A. Co. v. Barlow*, 63 N. Y. 62; *Starin v. Edson*, 112 N. Y. 206; *Woodruff v. E. R. Co.*, 93 N. Y. 609; *A. S. Bank v. Savery*, 82 N. Y. 291; *R. L. R. Co. v.*

*Roach*, 97 N. Y. 378.) No parol evidence was admitted by the trial court to vary the written contract. (Abbott's Tr. Ev. [2d ed.] 632; Underhill on Ev. 303, 304.)

O'BRIEN, J. On the 30th day of April, 1894, the defendant executed and delivered to the plaintiff a general assignment of all his property in trust for the benefit of creditors. The instrument contains the usual directions for the conversion of the property into money, and the distribution of the same among the creditors in the order therein designated. The last clause of the instrument is in these words: "The said party of the second part doth hereby accept the trust created and imposed on him by this instrument, and covenants and agrees with the said party of the first part that he will faithfully and without delay execute the created trust according to the best of his skill, knowledge and ability." The plaintiff took possession of the assigned property under this instrument and was proceeding to convert the same into money. It appears that the defendant was a harness maker and dealer in goods of that character, and for that purpose kept a store in which the business was conducted and where the property was at the time of the assignment. The plaintiff and defendant, while engaged in taking an inventory of the property, evidently supposed that there might be a surplus after paying all the debts, if the trust was judiciously administered, and to that circumstance we may attribute the present controversy.

On the 24th of May, 1894, about a month after the trust property was vested in the plaintiff and he had entered upon the execution of the trust, he procured the defendant to execute and deliver to him another written instrument which recited the fact that the general assignment had been made and that the understanding between the parties was to the effect that since the legal compensation to the plaintiff as assignee was small and insufficient for the best administration of the property, and that with proper management and diligent attention there probably would be a considerable surplus

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after settlement and payment of all just claims of creditors, and that in case there should be such surplus the plaintiff should have and receive, in addition to his legal fees and commissions, the sum of fifteen per cent, estimated at inventory, on all sums so remaining up to \$5,000, and ten per cent on anything remaining as surplus in excess of that sum.

It appears that after payment of the debts there remained a surplus in uncollected accounts and goods which, estimated at the inventory value, amounted to \$7,292.90. After the trust had been executed and the plaintiff discharged, and the property remaining turned over to the defendant, the plaintiff demanded payment of the amount claimed to be due to him under the special agreement, but the defendant declined to pay the same, and thereupon the plaintiff brought this action to recover the percentages upon the surplus secured to him by the terms of the agreement. The defense was that the agreement was without consideration and was void upon principles of public policy.

The learned trial judge submitted the case to the jury with instructions that if they found that nothing was intended by the agreement except to add to the plaintiff's legal compensation as assignee, then he could not recover, but in case it was found that the agreement provided for the performance of services by the plaintiff in the execution of the trust beyond that imposed upon him by law, under the assignment, then he could recover. The defendant's counsel excepted to the ruling of the court as expressed in the charge in which the intention of the parties in this respect was submitted to the jury. During the course of the trial the defendant's counsel, by exceptions to the denial of a motion to dismiss the complaint on the ground that the agreement was void, as without consideration and against public policy, and to proof of the reasonable value of the extra services claimed to have been performed by the plaintiff, and to oral proof of what the parties intended by the paper, and in various other ways challenged the validity of the instrument, upon the ground that it was void for want of any consideration to support it,

and as against public policy. The defendant's counsel requested the court to charge the jury that, as there was no mention of such a thing as the extra compensation between the parties prior to the execution of the assignment, if the plaintiff then understood that he was to do what he did in the execution of the trust he could not recover. The court declined to so charge, and the defendant's counsel duly excepted.

In the further discussion of the case, it may be assumed that the exceptions taken by the defendant's counsel during the trial and to the charge are sufficient to raise the question as to the validity of this agreement, whether resting upon the writing itself or supplemented by parol proof to show what the parties intended. There is nothing ambiguous in the language of the instrument upon which the action was based. The intention of the parties is perfectly plain, and the legal meaning and construction of the paper was for the court and not the jury. The writing states in the plainest terms that inasmuch as the legal compensation of the assignee was small and insufficient for the best administration of the property, and with such administration there would probably be a surplus, the parties proceeded to agree upon additional compensation and the principles upon which it was to be computed. Parol proof tending to show that the extra compensation stipulated for in the writing was reasonable, or proper, was wholly inadmissible. If the writing was otherwise valid it was enough that the parties had agreed upon the amount. If it was not valid in its general scope and purpose it could not be aided by the opinions of witnesses tending to show that under all the circumstances the arrangement was reasonable and proper. The moment the paper was made and delivered the law impressed upon it a legal character which followed it for all time, without regard to the opinion which the plaintiff or his witnesses had with respect to its operation, whether fair and reasonable or otherwise.

But, doubtless, the most important question in the case is with respect to the validity of the written instrument. If that

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was void for want of consideration, or upon principles of public policy, the plaintiff was not entitled to recover. The defendant's promise to pay the percentages on the surplus was, we think, without consideration, and hence the agreement was a mere *nudum pactum*. The only consideration alleged or claimed was the obligation of the plaintiff to administer the trust to the best of his knowledge, skill and ability. But he was already bound to do that, both by his express covenant and by law. A promise by one party to do that which he is already under a legal obligation to perform is insufficient as a consideration to support a contract. This principle has frequently been applied by this court, and is recognized as elementary in all of the authorities. (*Seybolt v. N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 562; *Robinson v. Jewett*, 116 N. Y. 40; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Crosby v. Wood*, 6 N. Y. 369; *Geer v. Archer*, 2 Barb. 420; *Arend v. Smith*, 151 N. Y. 502; *Olmstead v. Latimer*, 158 N. Y. 313; 2 Pars. on Cont. 437; Poll. Prin. Cont. 161, 162.)

It is argued by the learned counsel for the plaintiff that since his client managed the trust with such success as to leave a surplus for the assignor the agreement should be sustained. But that is precisely what he agreed to do when he assumed the trust, and what he was bound to do by law. This new promise by the plaintiff to do something which he was already bound to do produced no fresh advantage to the defendant or detriment to the plaintiff. We must assume that the plaintiff performed his duty as trustee with fidelity and skill; but he assumed that obligation when he accepted the trust. It may be admitted that he performed those duties better than they are ordinarily performed by trustees in such cases, but certainly he did not exceed the measure of his obligation to the defendant and his creditors, which was to administer the trust to the best of his knowledge, skill and ability. The fact that trustees in some cases neglect to execute such trusts as well as they might does not furnish any legal ground for one who does his duty to demand extra compensation. The plaintiff's standard of duty was prescribed by law and

by the terms of the trust instrument, and is not to be measured by the conduct of other trustees who failed to accomplish such desirable results.

We think, also, that the agreement is invalid on the ground of public policy. A trustee who holds the title to property for the benefit of others cannot use his position for his personal advantage. He cannot make profit for himself in the execution of the trust. He cannot ordinarily deal with the beneficiaries or parties interested in the estate so as to acquire the ownership of the trust property. We are now dealing with a case where the extra compensation was not given by will nor by the trust instrument, but by an agreement between the trustee and beneficiary after the former had accepted the trust and become vested with the title to the trust property. The learned counsel for the plaintiff has cited cases which contain dicta that would seem to support his contention, but in no one of them was the precise point involved. In most, if not all of them, the court referred to cases where extra compensation was given by will or by the trust instrument. It is, doubtless, true, as these cases hold, that a person may do what he will with his own. He may dispose of what he owns by gift or any other mode of transfer, if the transaction is free from fraud and can be said to be his voluntary act. The principle applies to parties who deal with each other on terms of equality, or, as it is sometimes expressed, at arm's length. But it has no application to the case of a trustee who bargains with the beneficiary for a greater share or interest in the trust estate than he would be otherwise entitled to. In such cases the trustee occupies the dominant position, and the beneficiary or person interested in the estate is, in some respects, subject to his power and influence. For obvious reasons the disability of the trustee to bargain with the beneficiary for a share or interest in the property, whether in the form of compensation or otherwise, is absolute in order to avoid the possibility of fraud. In such cases the law acts upon the principle that the temptation of self-interest is too powerful and insinuating to be trusted. (Perry on Trusts, §§ 129, 196, 209, 427;



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*Munson v. S., G. & C. R. R. Co.*, 103 N. Y. 58; *Sage v. Culver*, 147 N. Y. 241; *McClure v. Law*, 161 N. Y. 78.)

The plaintiff held all of the assigned property in trust, first for the benefit of creditors, and the surplus, if any, for the assignor. While occupying this position he bargained with the defendant for a large share of the surplus, if any, without any other consideration than the performance of services which he had already undertaken to perform for the statutory compensation. When the beneficiary is called upon to perform a contract entered into under such circumstances, as the defendant is in this case, he may resist the claim, and the courts cannot sustain such an agreement without encouraging obvious abuses in the administration of trusts.

The officer, or other person, to whom a fee or other compensation is allowed by law for any services, is forbidden by statute to charge or receive a greater fee or reward for that service than is so allowed. (Code, § 3280.) It was held that this statute applied to a claim by a court stenographer for extra compensation based upon an agreement, the consideration of which was his undertaking to furnish minutes more expeditiously than otherwise would be required. (*McCarthy v. Bonyng*, 12 Daly, 336; affirmed, 101 N. Y. 668.) We see no reason why it does not apply with equal force to the agreement in this case. When a statute forbids a person to ask or receive compensation for services in an official or trust capacity, greater than that prescribed by law, an agreement to pay such extra compensation creates no binding obligation. (*Hatch v. Mann*, 15 Wend. 44; *Crofut v. Brandt*, 58 N. Y. 106; *Moss v. Cohen*, 158 N. Y. 240.)

One of the defenses which the defendant interposed to the plaintiff's claim was that the agreement was made under some kind of duress, but this was negatived by the verdict of the jury. We have assumed that it was freely made, but it was, nevertheless, open to the defendant to assail it upon the grounds that have been discussed.

The judgment must be reversed and a new trial granted, costs to abide the event.

LANDON, J. I concur in the opinion of Judge O'ERIEEN. I take this occasion to remark: The unanimous decision of the Appellate Division, that there is evidence tending to support the verdict, is based upon the assumption that that court rules correctly upon the question of law applicable to the case. Both law and fact must support a verdict to give it validity; whence it follows that lacking either support it must fail. And where the supporting force of the law has been duly challenged during the trial, as in this case, the question of law is reviewable here, although the question of fact is not. The opposite doctrine seems to rest upon the theory that it is inconceivable that where the evidence supports a verdict, it can be reviewed upon the law without also reviewing it upon the facts. Such is not the view of the Constitution, for it does not preclude a review of the verdict or finding, but only of the unanimous decision of the Appellate Division that there is evidence supporting or tending to sustain it. It regards such decision as upon a question of law, otherwise there would be no need to exclude it from our jurisdiction to review questions of law. It excludes no other question of law, although it enables the legislature to do so by enabling it to further restrict our jurisdiction.

Now, a review of the question whether there is evidence supporting or tending to sustain a verdict or finding is not a review of that other question of law, namely, what judgment does the law require upon the settled facts. We may concede that if the course of the trial has been such that we cannot tell by an inspection of the record whether the facts as found require the legal result which the verdict declares, we have no question of law presented to us; but that is a mere question of practice. If, by an inspection of the record, we can see just what the facts are that have been settled, and also see that the question of law as to the verdict which the law requires thereon was distinctly presented, then, I think, we have jurisdiction to review it. Such is this case.

I submit that a party should not lose his right of review of a question of law essential to his protection by a tribunal

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established to review it, not because of any omission or fault of his own, but because the question of law which ought to be reviewed is pronounced by the same verdict and decision which also settles the facts.

PARKER, Ch. J. (dissenting). Two insuperable legal barriers should bar this court from considering whether the defendant was at the close of the trial entitled to judgment :

*First.* The defendant did not move at the close of his testimony or at the close of the case for the dismissal of the complaint or the direction of a verdict in his favor. The legal effect of that omission was recently stated by this court in *Pollock v. Pennsylvania Iron Works Co.* (157 N. Y. 699) as follows : "The legal effect of the omission of the defendant at the close of the testimony to move either for a dismissal of the complaint or the direction of a verdict in its favor was to consent to the submission of the case to the jury. We are, therefore, prevented from considering whether the defendant was entitled to judgment." (See, also, *Hecla Powder Co. v. Sigua Iron Co.*, 157 N. Y. 437, and the later case of *Hopkins v. Clark*, 158 N. Y. 299, where the authorities upon this branch of the practice were considered and the reason for the rule adopted by this court given.)

*Second.* The Appellate Division has unanimously affirmed the judgment entered upon the verdict of the jury, which was not directed. That the recent amendment to the Constitution of this state in such a situation deprives this court from considering whether a defendant was entitled to judgment has been often held by this court. It has been said in the discussion of the question that this court cannot review the ruling of a trial court in denying defendant's motion for a nonsuit even "if it be true that the trial court erred in holding that the evidence was sufficient to require the submission of the case to the jury and the Appellate Division was wrong in deciding that the evidence sustained the verdict." (*Szuchy v. H. C. & I. Co.*, 150 N. Y. 219, 222.) "We have no power to examine the record even to see if there is any evidence to

sustain the verdict." (*Amherst College v. Ritch*, 151 N. Y. 320.) "We are compelled by the Constitution and the statute to presume that there was sufficient evidence to sustain the facts found by the jury." (*Ayres v. D., L. & W. R. R. Co.*, 158 N. Y. 254, 257.) "The purpose and effect of the Constitution is to prohibit this court from in any case reviewing the question whether there is any, or sufficient, evidence to sustain a decision or undirected verdict, where there was a unanimous affirmance by the Appellate Division." (*Reed v. McCord*, 160 N. Y. 330, 337.) "The question whether a finding of fact, or a verdict upon issues of fact, is sustained by evidence, though in its very nature one of law, is not reviewable here, when the court below has decided unanimously that the judgment should be sustained. This one question of law has, therefore, in such cases, been withdrawn from the cognizance of this court, as well as all questions of fact." (*Marden v. Dorthy*, 160 N. Y. 39, 45.) This court is "required to assume in such a case that the evidence was of such a character as to justify the submission of the disputed question to the jury. It is quite true that the question whether there is any evidence tending to prove a fact is one of law \* \* \*" but "the effect of that limitation upon the power of this court to review the unanimous decision below that there was evidence to sustain the verdict is to withdraw a particular question of law, which was formerly reviewable here, from our jurisdiction." (*Meserole v. Hoyt*, 161 N. Y. 59, 61.) "We cannot review the facts or even look into the record to see whether they are supported by evidence or whether some other facts should be supplied." (*Farleigh v. Cadman*, 159 N. Y. 169, 175.) To the same effect is *Lewis v. L. I. R. R. Co.* (162 N. Y. 52), and *Kleiner v. Third Ave. R. R. Co.* (162 N. Y. 193), in which cases appeals to the Court of Appeals were allowed, in the first by the Appellate Division and in the last by a judge of this court.

The complaint alleges that the defendant was financially distressed with creditors pressing him for payment but with a considerable stock of goods on hand which he feared "would

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be sacrificed in efforts of said creditors to realize their claims and leave nothing for the defendant. That, thereupon, the plaintiff informed the defendant that he believed he could take said property and carry on said business, and therefrom, after paying all expenses, within a reasonable time pay all said debts and have a considerable surplus or residue after paying said claims. That, thereupon, it was agreed between the defendant and the plaintiff that the defendant would pay to the plaintiff 15 per cent of said residue, estimated at an inventory appraisal made, up to \$5,000, and 10 per cent upon all residue or surplus over and above said \$5,000, and in addition to all other compensation or fees, if the plaintiff would take said property and conduct said business until all defendant's debts and liabilities should be paid or satisfied. That, thereupon, and in consideration thereof the plaintiff took said property and carried on said business and paid all the expenses and debts of the defendant, and performed all things by him to be done." The trial resulted in a verdict in favor of the plaintiff for the amount claimed by him and the judgment entered thereon has been unanimously affirmed by the Appellate Division.

It is contended that a certain written agreement introduced in evidence by the plaintiff is against public policy and void. Without at all consenting to that contention, but assuming for the sake of argument that it may be so, we cannot hold that the defendant was entitled to judgment, for, as we have seen, we cannot even look into the record to see whether the verdict is supported by evidence nor whether there is any or sufficient evidence for we are bound "to presume that there was sufficient evidence to sustain the facts found by the jury." It is difficult to understand a process of reasoning by which the conclusion is reached that, while we cannot look into the record to see whether there is *any evidence* to support a finding by the jury, but must presume that there was ample evidence for that purpose, still, if we do look and find some evidence, we may condemn it as worthless and then hold, notwithstanding the unanimous affirmance of the Appellate

Division, that the defendant was not entitled to judgment and reverse it. I shall content myself with the mere statement of the proposition, for it seems very clear that it furnishes its own answer, and observe in passing that there would have been no opportunity for discussion of the effect of a unanimous affirmance by the Appellate Division had the record contained no evidence, but it has been insisted that when the record contains evidence the quality of it may be considered, and if found insufficient to support a judgment, it can be assumed that there is no other evidence in its support, and the judgment may, therefore, be reversed despite the command of the Constitution as construed by this court. The decisions furnish the answer to this contention, if it do not carry the answer on its very face, when they deny the right of this court to look into the record to see whether there is any evidence to support a verdict, or, if there is any evidence, whether it be sufficient evidence for that purpose. Here there was evidence; its effectiveness only is challenged.

The only questions of law, therefore, that can come before this court on this review must be presented by exceptions taken to rulings of the court in admitting or rejecting evidence and to the charge of the court. (*Ayres v. D., L. & W. R. R. Co.*, 158 N. Y. 254, 258.) And exceptions to the charge, which present merely the question whether or not there was evidence to warrant a finding or a verdict, cannot be considered, for it but presents in another form the question of law disposed of in the determination of the court to submit the case to the jury. That question was before this court in *Cronin v. Lord* (161 N. Y. 90) where the court was requested to instruct the jury that there was no evidence whatever of fraud or duress, and this court, in holding that the refusal of the court to so charge could not be reviewed in this court, the Appellate Division having unanimously affirmed the judgment entered on the verdict of the jury, said: "It is not reviewable in this court whatever may be the form of the exception, whether to a ruling submitting the case to the jury, refusing a nonsuit, or to a charge that there is or is not evidence, as the case may be,

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to warrant a finding or verdict on the disputed questions of fact."

There were but three exceptions taken either to the charge as made or to the refusal of the court to charge as requested by the defendant. The first request was that the jury should be instructed that, if the general assignment was accepted by the plaintiff with the understanding at that time he was to perform all the duties contemplated by the contract of May 24, 1894, then that contract was without consideration. The court declined to vary its charge in that respect, and an examination of the main charge discloses that the court had already fully and fairly instructed the jury in relation to that question. The court, after instructing the jury generally as to the memorandum of agreement, submitted to them whether "in entering into it the parties contemplated and intended to agree to start out to do something more than the mere legal requirements upon the assignee in carrying out the administration of the assigned estate in ordinary cases? If you so find upon the whole evidence in the case that the agreement does provide for more than was the duty of the assignee, then I charge you that it was such an agreement that the parties might properly enter into and provide for; that the defendant in this case would be responsible then for the compensation which he had agreed should be paid to the plaintiff. If, on the other hand, you come to the conclusion that nothing more was contemplated by this agreement than simply adding to the legal fees, then the plaintiff in this action cannot recover, and your verdict must be for defendant." The only other request to charge related to the same general question and need not be referred to, as it was fairly covered by that portion of the charge of the court to which reference has already been made. It should be observed, perhaps, that in the very able brief of the counsel for the appellant it is not claimed that the court erred in its refusal to charge as requested or that the only exception taken to the charge in chief presents error.

We come now to the consideration of the only exceptions which are the subject of review on this appeal upon which the appellant relies for reversal of the judgment. The plaintiff was allowed to testify to certain conversations with the defendant preceding the written agreement of May 24, 1894, and out of which, perhaps, the written agreement grew. The appellant insists that the effect of this evidence was to contradict or alter the written agreement, and, therefore, it should not have been received. If such were its effect, then his position is well taken and the judgment should be reversed. It is true that all of the conversation between the parties did not find its way into the writing which is supposed to express their final agreement, but no part of these conversations either add to or take from the contract. To illustrate: Mr. Carpenter said: "You have quite a large stock here, Mr. Taylor;" and Mr. Taylor replied: "Yes, but I am afraid it won't pay my debts." This part of a conversation expressed one point of view of each of the parties as to the existing situation, and suggests those preliminary considerations which led the parties to agree upon a course that involved the running of the business for months instead of closing it out as is ordinarily done, with a result most satisfactory to the defendant until the time came for him to pay the agreed compensation for the skillful and almost continuous services of the plaintiff; and well it may have been satisfactory to him, for during those few months and through the instrumentality of this plaintiff defendant's goods had passed out from under the levy of the sheriff, his debts had been paid and he was in possession of a going business with a stock of substantial value and an available surplus. The evidence complained of was not offered for the purpose of varying the contract or to show that the parties made a different agreement than that which was subsequently expressed in writing, nor did it have that effect, but, in view of the character of the defense, it was receivable because it was proper to show the facts and circumstances surrounding and attending the making of the written agreement inasmuch as the rule of law was not thereby violated



which prohibits the introduction of oral testimony for the purpose of varying the terms of a written agreement.

The judgment should be affirmed, with costs.

BARTLETT, HAIGHT, LANDON and CULLEN, JJ., concur with O'BRIEN, J., for reversal; VANN, J., concurs with PARKER, Ch. J., for affirmance.

Judgment reversed, etc.

EPPENS, SMITH & WIEMANN COMPANY, Appellant, v. LOMAX  
LITTLEJOHN et al., Respondents.

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1. SALE OF GOODS TO BE SHIPPED—SHIPMENT MUST BE MADE IN REASONABLE TIME WHEN NO TIME IS FIXED THEREFOR—WHAT CONSTITUTES REASONABLE TIME—BURDEN OF PROOF. Where a contract for the sale of goods to be shipped from a foreign port fixes no time for the shipment, it must be made in a reasonable time, and that depends upon the circumstances of the particular case, such at least as the parties may be supposed to have contemplated in a general way in making the contract, and the burden is upon the seller to show compliance in that particular in an action to recover damages for the buyer's refusal to accept and pay for the goods.

2. PERSONAL INABILITY TO TAKE ADVANTAGE OF SHIPPING FACILITIES NOT AVAILABLE TO DISPROVE OR EXCUSE DELAY IN SHIPMENT. Where upon the trial of such an action it appears that it was expected by the defendant and impliedly agreed by plaintiff that it was in a situation to secure a shipment by the first sailing vessel leaving the port able to store and carry the goods properly; that the shipment was delayed nine months and ten days, which delay was characterized by plaintiff itself within five months from the execution of the contract as "altogether unreasonable" and by one of his witnesses as an "uncommonly long time;" that it was caused by a prejudice or discrimination against the plaintiff or its vendors at the foreign port, although every reasonable effort had been made to ship the goods and they were shipped at the first opportunity, the delay is unreasonable, having been caused, not by a lack of transportation facilities, but by plaintiff's personal inability to take advantage of them, and such personal disadvantage is not within the contemplation of the contract and is not available either to disprove unreasonable delay or to excuse it.

3. APPEAL—RIGHT OF APPELLANT TO COMPLAIN OF THE TESTIMONY OF HIS OWN WITNESSES. Where plaintiff's witnesses have testified in explanation of and as an excuse for the delay in shipment that it was caused through plaintiff's inability to procure vessels by reason of a prej-

udice or discrimination existing against it at the foreign port and theirs is the only testimony upon the subject, he cannot complain on appeal that their testimony has been accepted as true and insist that there is no evidence of such prejudice or discrimination because his witnesses had assumed its existence without stating the particular facts tending to show it.

4. WHEN WAIVER OF DELAY IN SHIPMENT IS QUESTION OF FACT. A question of fact to be answered by inferences from the circumstances is presented by plaintiff's claim that the defendants waived the delay in shipment by not objecting to it on or soon after it notified them, pursuant to the terms of the contract, of the name of the vessel upon which it intended to make the shipment, when it appears that it did not then notify them when the vessel would sail; one of them testifying that upon receiving the notice he supposed the vessel had sailed, although it did not in fact sail until some considerable time thereafter; and it further appears that the plaintiff, pursuant to the contract, notified the defendants of the marks of the goods, and that they repudiated the contract nearly two months before the vessel arrived, and it does not appear that they delayed giving the plaintiff notice of the repudiation.

5. WHEN RECEIPT OF LETTER REFUSING TO CHANGE METHOD OF SHIPMENT AND FIXING LIMIT OF TIME THEREFOR IS A QUESTION OF FACT — ASSENT BY FAILURE TO RESPOND. The question whether the plaintiff received a letter which was addressed to it by the defendants, refusing to grant a request preferred by plaintiff's agent, to accept steam transportation *via* another port instead of direct transportation by sailing vessel, and which letter contained in addition an extension of time for shipment to a date therein specified, is a question of fact, when the plaintiff, by its president, the day after the letter bears date, wrote to its agents at the port of shipment that the shipment must be by sail, as no other way would be satisfactory to the vendees; and when the plaintiff has received such letter and fails to respond to it, he will be deemed to have assented to defendants' understanding of the limit of reasonable time required by the contract, and will be bound by the date of shipment therein fixed.

6. EVIDENCE — ADMISSIBILITY OF STATEMENT TENDING TO SHOW UNDERSTANDING OF PARTIES AS TO MEANING OF CONTRACT. A statement by plaintiff's duly authorized agent, when making the contract, that he had no doubt that the shipment could be made during specified months, may be considered by the jury in determining what was a reasonable time in which to make the shipment, since it would show about what the parties understood it to be, although it would not fix the exact time.

*Eppens, Smith & Wiemann Co. v. Littlejohn*, 27 App. Div. 22, affirmed.

(Argued June 11, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March

N. Y. Rep.]

Statement of case.

26, 1898, affirming a judgment in favor of defendants entered upon a verdict, and an order denying a motion for a new trial.

The action was brought to recover damages for defendants' refusal to accept and pay for a certain lot of coffee bought and sold by the following contract:

"STANDARD CONTRACT.

"NEW YORK, *Feb.* 8, 1893.

"Expected mark.

" 'E. S. & W.' "

" 'M' "

"Sold for account of M. Eppens, Smith and Wiemann Co., to Mess. Littlejohn & Parsons. The sound and made sound portion of about (1,000) one thousand piculs picked Corinchie coffee (marks, numbers and name of vessel or vessels to be given as soon as known and before the arrival of the coffee) to arrive and to be shipped per sailing vessel called the from Padang bound for New York, at (27½) twenty-seven and half cents, gold, per pound, basis of four months' notes, bill to date, when the coffee is all in store. Cash as delivered less discount at the rate of seven per cent. per annum for unexpired time. No arrival, no sale.

"TEACKLE W. LEWIS, *Broker.*

"Accepted.

"EPPENS, SMITH AND WIEMANN CO.,

"JOHN F. PUPKE, *President.*"

The contract was silent as to the time of delivery, and defendants pleaded affirmatively that it had been unreasonably delayed; also that subsequent to the making of the contract the parties had expressly agreed upon a specific time, prior to which shipment must be made. There was no controversy as to the quality of the coffee, nor as to the amount of damages, the latter having been agreed upon as amounting to five thousand dollars.

The shipment was actually made from Padang November 16, 1893, and the coffee arrived March 12, 1894. This was the usual length of the voyage by sailing vessel. Other facts are stated in the opinion.

At the close of the evidence plaintiff's motion to direct a verdict was denied and the case was submitted to the jury, who rendered a verdict for defendants.

*George A. Strong* for appellant. Assuming that plaintiff was in default for not shipping the coffee within the proper time, this default was waived by the defendants. (*Holmes v. Holmes*, 9 N. Y. 525; *Hoyt v. Thompson*, 19 N. Y. 207; *Smith v. Poillon*, 87 N. Y. 590; *Woolner v. Hill*, 93 N. Y. 576; *Bogardus v. N. Y. L. Ins. Co.*, 101 N. Y. 328.) Upon the evidence there was no question for the jury, whether plaintiff had shipped the coffee within a reasonable time. (*Wangler v. Swift*, 90 N. Y. 38; *Hickey v. Taaffe*, 99 N. Y. 204; *Martin v. Farnsworth*, 49 N. Y. 558; *Doubleday v. Kress*, 50 N. Y. 410; *Crane v. Evans*, 1 N. Y. S. R. 216.) The case was erroneously submitted to the jury. (*Baldwin v. Burrows*, 47 N. Y. 199; *Rowan v. Hyatt*, 45 N. Y. 138.)

*Frederic G. Dow* for respondents. The cause was submitted to the jury upon a correct construction of the law, and there was ample evidence to sustain the verdict. (*Pope v. T. H. C. & M. Co.*, 107 N. Y. 61; *N. H. & N. Co. v. Quintard*, 6 Abb. Pr. [N. S.] 128; *F. L. & T. Co. v. Hunt*, 16 Barb. 514; *Jones v. Fowler*, 37 How. Pr. 104; *White v. Talmage*, 3 J. & S. 223; *Newton v. Wales*, 3 Robt. 453; Whart. on Cont. § 882; *Ellis v. Thompson*, 3 M. & W. 245; *Morgan v. Short*, 13 Misc. Rep. 279; *Mayer v. Dean*, 115 N. Y. 557; *Phillips v. Taylor*, 17 J. & S. 318; *Beebe v. Johnson*, 19 Wend. 500; *Arthur v. Wright*, 57 Hun, 22.)

LANDON, J. The parties knew when they made their contract that, owing to the few sailing vessels leaving Padang, in Sumatra, for New York, a delay of some weeks or months might occur in making the shipment of coffee. As they fixed no time for the shipment in the contract itself, the law required the shipment to be made within a reasonable time, and the burden was upon the plaintiff to show compliance in

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N. Y. Rep.] Opinion of the Court, per LONDON, J.

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this particular. (*Pope v. Terre Haute Car & Mfg. Co.*, 107 N. Y. 61.) What constitutes a reasonable time usually depends upon the circumstances of the particular case, such, at least, as the parties may be supposed to have contemplated in a general way in making the contract. (*Stewart v. Marvel*, 101 N. Y. 357.)

The contract was made in New York February 8, 1893. The plaintiff shipped the coffee from Padang for New York November 18, 1893, a delay of nine months and ten days. A sailing vessel left Padang for New York laden with coffee and rattan March 30th, one May 4th, one Sept. 10th, and another November 7th. The plaintiff by its agents at Padang requested each of these vessels to take this coffee and the request was refused. The evidence given on the part of the plaintiff tends to show that this refusal was made through the influence of the plaintiff's rivals in the coffee trade at that port, and the hostility of the charterers of vessels to one Matzen, the agent of the vendors of the coffee to the plaintiff, who acted for the plaintiff in trying to procure the shipment. The plaintiff now insists that there is no evidence that the delay in shipment was caused by prejudice or discrimination against itself or its vendors at Padang. A close examination of the testimony of the plaintiff's witnesses — and there were no other upon this point — shows that it consists of their assuming, in explanation and excuse for the delay, that such prejudice and discrimination existed, instead of their stating the particular facts tending to show its existence. But the plaintiff cannot be heard to complain that this testimony was taken at the value at which it offered it; the excuse could be accepted as true, although insufficient.

In making the contract it was undoubtedly expected by the defendant, and impliedly agreed by the plaintiff, that the latter was in a situation to secure a shipment by the first sailing vessel leaving Padang for New York, able to store and carry the coffee properly. A sailing vessel usually carries from 15,000 to 20,000 piculs, and the plaintiff's shipment was of only 1,000 piculs.

Matzen resided at Padang, and was a witness in behalf of the plaintiff. He testified that the shipment was delayed "an uncommonly long time." The plaintiff's president as early as July 10th wrote to the plaintiff's agent Pearson at Padang and characterized the delay as "altogether unreasonable." This letter was objected to by the plaintiff, but it was clearly the plaintiff's act in the matter of the shipment itself. There was much testimony tending to show the experience of the trade as to the time in which shipments from Padang had been made.

Thus the jury could find that although the plaintiff made every reasonable effort to ship the coffee promptly, and did ship it at the first opportunity it could command, nevertheless the delay in the shipment was prolonged, not because of the conditions and circumstances of the shipping facilities themselves, but because of the plaintiff's personal inability to avail itself of them. The delay was, therefore, unreasonable as to the defendant, because uncommonly long, and made so by conditions peculiar to the plaintiff, and not to the transportation facilities. This personal disadvantage was not within the contemplation of the contract, and is not available to the plaintiff either to disprove unreasonable delay or to excuse it. (*Adams v. Royal Mail Steam-Packet Co.*, 5 C. B. [N. S.] 492; *Ellis v. Thompson*, 3 Mees. & W. 445; *Beebe v. Johnson*, 19 Wend. 500; *Arthur v. Wright*, 57 Hun, 22; *New Haven & N. Co. v. Quintard*, 6 Abb. Pr. [N. S.] 128; *Phillips v. Taylor*, 17 J. & S. 318.)

The plaintiff objects that the case was not tried upon the above theory. The trial court charged at the request of the plaintiff:

"If the jury find upon the evidence that plaintiff made the shipment of this coffee upon the first vessel that would give the space for it, then plaintiff is entitled to a verdict."

"If the jury find upon the evidence that plaintiff made all reasonable efforts to ship this coffee promptly, taking into consideration all the facts and circumstances of this case, then plaintiff is entitled to a verdict."

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At the request of the defendants the trial court further charged :

“ If the jury find that the failure of the plaintiff to obtain freight room for the shipment of coffee was due to a discrimination of charterers against them or their consignors in Padang, that fact is not an excuse for the failure of plaintiff to ship the coffee within a reasonable time.”

This portion of the charge modified the preceding portions quoted above, and brought the case within the rules stated. The judgment for the defendants should, therefore, be affirmed unless some exception upon other grounds presents reversible error.

The plaintiff urges that the defendants waived the delay in shipment by not objecting to it on or soon after August 16th, when the plaintiff notified the defendants, pursuant to the terms of the contract, of the name of the vessel upon which it intended to make the shipment. The plaintiff did not then notify the defendants when the vessel would sail ; one of the defendants testified that upon receiving the notice he supposed the vessel had sailed. On December 27th the plaintiff notified the defendants of the marks of the coffees, and on December 30th the defendants repudiated the contract because of the delay. This was nearly two and a half months before the vessel arrived. It does not appear that the defendants delayed giving the plaintiff notice after finally deciding to repudiate the contract. A question of fact was thus presented, to be answered by inference from the circumstances. The jury could within the evidence answer it as they did in favor of the defendants.

It was one of the defenses that in March, 1893, Lewis, the broker who had made the original contract for the plaintiff with the defendants, made for the plaintiff a further agreement with them whereby the time for the shipment of the coffee from Padang was extended and limited to June 30th. The plaintiff urges that under the evidence in support of this defense and the instructions of the court, to all of which the plaintiff excepted, the jury might have found for the defend-

ants upon this ground and not upon the other. We proceed to its examination. It will be observed that the first ground we have discussed rests upon the evidence of the plaintiff and seems to require a verdict for the defendants, and thus to eliminate reversibility for errors, if any, upon the ground now under consideration. That Lewis did assume to make in behalf of the plaintiff such further agreement with the defendants is settled by the verdict upon conflicting evidence. The only open questions are, did he have the plaintiff's authority to do so, or did the plaintiff ratify the agreement after it was made, or, apart from the agreement, did plaintiff acquiesce in the defendants' construction of what would be reasonable time? The plaintiff sent Lewis to the defendants to ask their permission to ship the coffee *via* Singapore by steamship instead of by sailing vessel direct from Padang. This would obviate or lessen the delay in shipment, but the defendants refused the request because steam transportation might injure the quality of the coffee. Lewis had no other or further express authority from plaintiff; whether he had ostensible authority we do not think it necessary to decide.

The evidence is that the defendants upon making this extension or limit of time mailed a letter addressed to the plaintiff stating their refusal to accept steam transportation *via* Singapore, and adding, "We grant an extension of time of shipment to June 30th, 1893." This letter bears date March 20th. The plaintiff's president denies the receipt of the letter, but the plaintiff had other agents who might have received it. On March 21st, however, the plaintiff, by its president, wrote to its vendors in Padang that the shipment must be by sail, as no other way would be satisfactory to the vendees in New York. The question of the plaintiff's receipt of the letter was for the jury. (*Austin v. Holland*, 69 N. Y. 571; *Oregon Steamship Co. v. Otis*, 100 N. Y. 446.) The plaintiff made no response to the letter. The letter informed the plaintiff of the result of the mission upon which plaintiff had sent Lewis to the defendants, and if that result was not satisfactory, the plaintiff should have promptly repudiated it.



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But apart from the question of agency, the plaintiff, through Lewis, asked the defendants a question affecting the method of shipment, and involving the question of its time. The defendants answered the direct question, and then stated their disposition of the involved question of time. The answer was their understanding of the limit of reasonable time required by the contract. If it was not also the plaintiff's, it was its duty to say so.

If the letter had proposed an alteration of the contract, the rule might be different, but it assumed to give it a fixed meaning consistent with its terms, a meaning apparently favorable to the plaintiff, a meaning to which the plaintiff, without any response, could hold the defendants, and, therefore, to which, in the absence of a response, it should itself be held.

The defendants gave evidence to the effect that Lewis, when he made the contract with them in February, stated that he had no doubt the shipment would be made in February — March. The trial court charged the jury that if they found that Lewis made that statement, the jury might consider it in determining what was a reasonable time within which the shipment was to be made. That was not error. There is no question about the authority of Lewis to make the statement. (*Mayer v. Dean*, 115 N. Y. 556.) One test of reasonable time is the time within the contemplation of the parties in making the contract; if they then talked it over and understood it alike, while that fact would not fix the exact limit, it would show about what they understood it would be. If Lewis had then said it would probably be twelve months before the shipment could be made, the plaintiff would have sought to show it. In either case the evidence would not vary the contract, but would show its meaning as the parties understood it. (*Ellis v. Thompson*, *supra*; Wharton on Contracts, sec. 882.)

The judgment should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN and CULLEN, JJ., concur.

Judgment affirmed.

In the Matter of the Judicial Settlement of the Accounts of  
ALBERT C. HALL and THOMAS G. RITCH, Appellants, as  
Trustees of ALVAH HALL, Deceased.

ISABEL M. HALL et al., Respondents.

1. APPEAL—UNANIMOUS AFFIRMANCE OF SURROGATE'S DECREE BY APPELLATE DIVISION. Where a referee acquits testamentary trustees of bad faith in making an investment, but holds them liable to the *cestuis que trust* on the ground that the character of the investment was illegal, and his report is confirmed by the surrogate, and the latter's decree is unanimously affirmed by the Appellate Division, which, while it holds that under the will the trustees were not limited to ordinary trust investments, was of the opinion that the investment was speculative and hazardous and, therefore, improper, the Court of Appeals must affirm the judgment, and cannot look into the evidence to see how speculative or unreasonable the investment was.

2. TESTAMENTARY TRUSTEES—LIABILITY FOR LOSS FROM INVESTMENTS. Trustees under a will empowering them to invest the funds of the trust "in any security, real or personal, which they may deem for the benefit of my estate and calculated to carry out the intention of this, my last will," are given a discretion as to the character of investments they may make, and are not limited to the investments required by a court of equity, in the absence of any direction from the testator; but they must exercise a sound discretion as well as good faith and honest judgment, and, in the absence of words in the will giving greater authority, are not authorized to invest the fund in new speculative or hazardous ventures, although they acted in good faith, and they will be held liable to the non-assenting *cestuis que trust* for losses resulting from such an investment.

3. ESTOPPEL OF ASSENTING CESTUIS QUE TRUST—MODIFICATION ON APPEAL OF DECREE PROTECTING TRUSTEES. Equitable life tenants of a trust fund who consent to such an investment are estopped from questioning its propriety, and when, in certain contingencies, they may be entitled to share in the principal of the fund, a surrogate's decree which authorizes the trustees to retain the shares of life tenants who consented to the investment, in the income produced by the sum which the trustees are directed by the decree to pay into the fund on account of the loss resulting from the investment, must be modified on appeal so as to provide that in case any beneficiary who has assented to the investment shall become entitled to any part of the principal of the fund paid by the trustees, then the trustees may retain such part.

*Matter of Hall*, 48 App. Div. 488, modified.

(Argued June 8, 1900; decided October 2, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, made March 6, 1900, affirming a decree of the Surrogate's Court of the county of New York adjudging certain investments made by the trustees herein to have been illegal and unauthorized.

The facts, so far as material, are stated in the opinion.

*C. N. Bovee, Jr.*, for appellants. The testator had power to enlarge the field of investment for trustees named in his will. (*Denike v. Harris*, 84 N. Y. 89; *Matter of Stewart*, 30 App. Div. 368.) The will itself authorized the trustees to make the investments which were made. (*Lawton v. Lawton*, 35 App. Div. 389; *Baud v. Fardell*, 7 De G., M. & G. 628; *Lewis v. Nobbs*, L. R. [8 Ch. Div.] 591; *Forbes v. Ross*, 2 Cox Ch. Cas. 116; 3 Williams on Executors [7th Am. ed.], 335.) In the light of the surrounding circumstances, the language of the will confers upon the trustees the widest discretion in the investment of funds of the estate. (*Lawton v. Lawton*, 35 App. Div. 389; *Denike v. Harris*, 84 N. Y. 89; *Greene v. Greene*, 125 N. Y. 506; *Speight v. Gaunt*, L. R. [22 Ch. Div.] 727; *Matter of Lee*, 141 N. Y. 58; *Matter of Keinz*, 88 Hun, 298; *Matter of Hoyt*, 160 N. Y. 607.) All that a court of equity requires is common skill, common prudence and common caution. The trustees acted in good faith. They used such diligence and prudence as men of discretion and intelligence in such matters employ in their own like affairs. (*Bartals' Estate*, 182 Penn. St. 407; *Crabb v. Young*, 92 N. Y. 65; *Thompson v. Brown*, 4 Johns. Ch. 619; *Knight v. Earl of Plymouth*, 3 Atk. 480; *Jack's Appeal*, 94 Penn. St. 371; *Dabney's Appeal*, 120 Penn. St. 356; *Cooper v. Cooper*, 77 Va. 20; *Merritt v. Merritt*, 62 Mo. 157; *Mickle v. Brown*, 4 Baxt. [Tenn.] 468; *Lovell v. Nimot*, 20 Pick. 116.) The court has power to enlarge or restrict the list of specific investments allowed to trustees, having due regard to the custom of prudent investors in the community at the time. (*King v. Talbot*, 40 N. Y. 76; 9 Pick. 140; 20 Pick. 116; *Ormiston v. Orcutt*, 84 N. Y. 343; *Mills v. Hoffman*, 26 Hun, 600.)

*William C. Cammann* for respondents. The authority granted by the terms of the will itself was not broad enough to warrant the investment made. (*King v. Talbot*, 40 N. Y. 76; *Adair v. Brimmer*, 74 N. Y. 539.) On the facts and with or without any discretion the investment was unwarranted and must be condemned. (*King v. Talbot*, 40 N. Y. 76.)

*Bernard J. Tinney*, special guardian, for infant respondents. The investment of the \$25,000 in the umbrella trust by the trustees was unauthorized either in law or by the will. (*King v. Talbot*, 40 N. Y. 76; *Adair v. Brimmer*, 74 N. Y. 539; *Warren v. Union Bank*, 157 N. Y. 268.)

CULLEN, J. The question in the case is as to the liability of the appellants as trustees for an investment of twenty-five thousand dollars in the debenture stock of "The Umbrella Company." The authority given the appellants by the will is: "I hereby give my said executors and trustees hereinbefore named full power to reinvest the proceeds of such sale or other act as aforesaid in any security real or personal which they may deem for the benefit of my estate and calculated to carry out the intention of this my last will." The testator himself had been in the umbrella business, and by the sixth clause of his will he directed that his interest in the business be closed on the first day of July or the first of January immediately following his decease. The referee acquitted the appellants of any bad faith, but held them liable on the ground that the character of the investment was illegal. This report was confirmed by the surrogate and the surrogate's decree unanimously affirmed by the Appellate Division, which, while it held that under the will the trustees were not limited to what might be called ordinary trust investments, was of opinion that the investment was speculative and hazardous, and, therefore, improper. With this view we agree. As there was a unanimous affirmance below, unless we are prepared to decide that good faith exonerates the trustees from

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liability, no matter how speculative, hazardous or unwise the investment may have been, we must affirm the judgment and cannot look into the evidence to see how speculative or unreasonable the investment was.

The investment in the case at bar was in the preferred stock of a corporation organized to conduct the manufacture and sale of umbrellas, and formed by the consolidation of several firms at the time engaged in that business. The corporation had no real estate or plant. The preferred or debenture stock was issued for merchandise, fixtures and book accounts of the firms, while the common stock was issued for the supposed good will of those firms. While the money was not paid on an original subscription of stock, but the stock was bought from a holder, still it was during the very first days of the existence of the company and before experience had shown that it could achieve any success or stability. After doing business for a short time the corporation failed and two-thirds of the investment of twenty-five thousand dollars was lost. One of the firms from the consolidation of which the corporation sprang was that of the appellant Hall, in which firm the testator at the time of his decease was a partner. As pointed out in the opinion delivered by Justice BARTLETT in the Appellate Division the testator certainly never intended that the money he had directed to be withdrawn from the business should be invested in the same business.

We concede that under the terms of the will the trustees were given a discretion as to the character of the investments they might make, and that they were not limited to the investments required by a court of equity in the absence of any directions from a testator. The trusts of this will are to provide the testator's children with incomes during their lives, and on their deaths the principal is to go to their issue. The very object of the creation of the trust, was, therefore, the security of the principal, otherwise the testator might better have given the property outright to his children who were the primary objects of his bounty. The range of so-called

"legal securities" for the investment of trust funds is so narrow in this state that a testator may well be disposed to grant to his executors or trustees greater liberty in placing the funds of the estate. But such a discretion in the absence of words in the will giving greater authority should not be held to authorize investment of the fund in new speculative or hazardous ventures. If the trustees had invested in the stock of a railroad, manufacturing, banking, or even business corporation, which, by its successful conduct for a long period of time, had achieved a standing in commercial circles and acquired the confidence of investors, their conduct would have been justified, although the investment proved unfortunate. But the distinction between such an investment and the one before us is very marked. Surely there is a mean between a government bond and the stock of an Alaska gold mine, and the fact that a trustee is not limited to the one does not authorize him to invest in the other.

In our judgment the authority given to the appellants by this will is quite similar to that vested in trustees in the New England states, where the strict English rule as to the investment of trust securities which prevails in this state does not obtain. In *Mattocks v. Moulton* (84 Maine, 545) it was held that in the investment of trust funds the trustee must exercise *sound discretion* as well as good faith and honest judgment. The court said: "It will be generally conceded that a mere business chance or prospect, however promising, is not a proper place for trust funds. While, of course, all investments, however carefully made, are more or less liable to depreciate and become worthless, experience has shown that certain classes of investments are peculiarly liable to such depreciation and loss. These, of course, would be avoided by every prudent man who is investing his own money with a view to permanency and security rather than chance of profit. A trustee should, therefore, avoid them, even though he sincerely believes a particular investment of that class to be safe as well as profitable." In *Dickinson*, appellant (152 Mass. 184), a trustee was held liable for an investment in

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Statement of case.

Union Pacific railroad stock. It was there said: "Our cases, however, show that trustees in this commonwealth are permitted to invest portions of trust funds in dividend-paying stocks and interest-bearing bonds of private business corporations, *when the corporations have acquired, by reason of the amount of their property, and the prudent management of their affairs, such a reputation that cautious and intelligent persons commonly invest their own money in such stocks and bonds as permanent investments.*"

Several of the equitable life tenants consented to the investment made by the trustees and are estopped from questioning its propriety. The courts below have so held and have authorized the trustees to retain the shares of such life tenants in the income produced by the sum which the appellants have been directed to pay into the fund on account of the loss on the securities. The decree, however, does not go far enough in this respect, for in certain contingencies these life tenants may be entitled to share in the principal of the fund. The decree should be modified so as to provide that in case any beneficiary who has assented to the investment in the umbrella stock should become entitled to any part of the principal of the fund paid by the trustees, then the trustees may retain such part, and as so modified affirmed, without costs of this appeal to any party.

O'BRIEN, BARTLETT, HAIGHT and LANDON, JJ., concur; PARKER, Ch. J., and VANN, J., dissent.

Judgment accordingly.

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HARRY H. LAMKIN, Respondent, v. JOSEPH W. PALMER,  
Appellant.

1. APPEAL — WHEN QUESTION OF LAW DEPENDENT UPON DETERMINATION OF QUESTION OF FACT IS NOT REVIEWABLE. The question as to whether a contract is void under the Statute of Frauds is ordinarily a question of law reviewable by the Court of Appeals under an exception taken to a refusal to nonsuit upon that ground; but in a case where that question is dependent upon the determination of a question of fact, viz.,

as to whether there was a consideration sufficient to sustain the contract, and that has been settled by a verdict and by a unanimous affirmance by the Appellate Division of the judgment entered thereon, exceptions to the refusal to nonsuit upon that ground raise no question which the Court of Appeals has power to review.

2. TRIAL—REFUSAL OF REQUEST TO CHARGE. Where a stockholder of a corporation, who is also a creditor, signs a consent that a sale of its property be made, and receives in lieu thereof from the party benefited by such consent his oral promise to pay from the proceeds of such sale the sum due to him as a creditor, the question of consideration to support the agreement is not solely dependent upon such consent as a stockholder, and upon the trial of an action to recover such sum, a request to charge that it was not necessary that every stockholder should give his consent either in writing or orally in order to enable the trustees to make a valid sale of the property of the corporation is properly refused.

*Lamkin v. Palmer*, 24 App. Div. 255, affirmed.

(Argued June 15, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 30, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Walter S. Hubbell* for appellant. There was no consideration for defendant's alleged promise to pay the plaintiff, and such, if made at all, was a void promise. (*Jones v. Bacon*, 72 Hun, 506.)

*Frank Brundage* for respondent. The promise of the defendant to pay the plaintiff's claim in order to procure him to sign the consent was not the promise of the defendant to pay the debt of another, but his personal promise upon a sufficient consideration, and the debt thereupon became the debt of the defendant. (*Leonard v. Vredenburg*, 8 Johns. 39; *Mallory v. Gillette*, 21 N. Y. 417; *Brown v. Weber*, 38 N. Y. 187; *Jones v. Bacon*, 72 Hun, 506; 145 N. Y. 446; *Ackley v. Parmenter*, 98 N. Y. 425; *Smart v. Smart*, 97 N.



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Y. 559; *White v. Rintoul*, 108 N. Y. 223; *F. N. Bank v. Chalmers*, 144 N. Y. 432; *Raabe v. Squier*, 148 N. Y. 81; *Merserau Co. v. Washburn*, 6 App. Div. 404.)

HAIGHT, J. This action was brought to recover the sum of \$2,150.00 upon an oral promise of the defendant to pay the plaintiff that sum out of the proceeds of the sale of the property of the M. S. Robinson Musee Co.

The facts are somewhat complicated, but for the purpose of raising the questions presented upon this appeal, they may be briefly stated as follows: The plaintiff was an employee and stockholder in the M. S. Robinson Musee Co., a corporation operating theatres in the city of Buffalo and in the city of Rochester. He had loaned to the president of the company, M. S. Robinson, to be used by the company in the operation of its theatres, the money in question. The Buffalo theatre had been destroyed by fire and the defendant had become obligated to pay certain indebtedness incurred by the Rochester theatre. He had procured from a person in Detroit an offer to purchase from him the Rochester property, and was endeavoring to procure the consent of the stockholders for the sale to him of such theatre to the end that he might accept the offer of the Detroit gentleman and effect a sale to him and then appropriate the proceeds to the payment of the debts of the Rochester theatre which he had become obligated to pay. The defendant, in order to induce the plaintiff to sign the consent, made the agreement, upon which this action is founded. The defendant, by his answer, denied many of the allegations of the complaint and then alleged: "That the agreement referred to in the complaint, if made at all, was made without consideration, and the same not being in writing was void by the statute of frauds of the State of New York." Upon the trial, at the conclusion of the plaintiff's evidence, the defendant moved for a nonsuit upon the grounds that the plaintiff had failed to establish a cause of action; that the contract proven was made absolutely without any consideration, and that it was void under the Statute of

Frauds. The motion was denied and an exception was taken. The same motion was renewed at the conclusion of the evidence with a like ruling and exception.

We are of the opinion that these exceptions do not raise any question which this court has the power to review. Ordinarily the question as to whether the contract is void under the Statute of Frauds is a question of law which may be reviewed in this court under an exception taken to a refusal to nonsuit upon that ground; but in this case the question is dependent upon the determination of a fact at issue under the pleadings, and that is as to whether there was a consideration sufficient to sustain the contract. If there was a new and distinct consideration moving to the defendant and beneficial to him, the promise to pay was not within the statute. (*Leonard v. Vredenburg*, 8 Johnson, 29, 30; *Raabe v. Squire*, 148 N. Y. 81.) The question, therefore, is as to whether there was a new and distinct consideration moving to the defendant out of which he expected to derive a benefit. This called for a determination of a question of fact which has been settled by the verdict and the unanimous affirmance of the judgment entered thereon by the Appellate Division. (*Szuchy v. Hillside Coal & Iron Co.*, 150 N. Y. 219; *Amherst College v. Ritch*, 151 N. Y. 282; *Ayres v. D., L. & W. R. R. Co.*, 158 N. Y. 254; *Reed v. McCord*, 160 N. Y. 330; *Cronin v. Lord*, 161 N. Y. 90; *Lewis v. Long Island R. R. Co.*, 162 N. Y. 52.)

In submitting the case to the jury the court refused to charge the defendant's request to the effect that it was not necessary that every stockholder should give his consent either in writing or orally in order to enable the trustees to make a valid sale of the property of the corporation. Assuming, for the purpose of this case, that the request presented a sound proposition of law, we are of the opinion that no error was committed by the refusal of the court to so charge, for the reason that it had no application to the facts of this case. The plaintiff had furnished money to be used in carrying on the business of the corporation; he was a creditor and had

the right to seek indemnity from the assets of the company. The defendant was seeking a transfer of the assets of the company so that he could convert the same into money and pay off the debts that he had become obligated to pay. The plaintiff, by his consent, released his right to follow the assets for the satisfaction of his claim and accepted the promise of the defendant to pay him out of the proceeds of the sale. The contemplated purchaser refused to complete the purchase unless the claim of the plaintiff was settled or his consent to the transfer obtained. The sale was for \$12,000. The transaction was, therefore, beneficial to the defendant, for it enabled him to relieve himself of a greater portion of the obligations assumed by him to the other creditors. The question of consideration to support the agreement was not, therefore, dependent solely upon the consent of the plaintiff as stockholder.

The other exceptions to which our attention has been called were properly disposed of by the Appellate Division.

The judgment should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, VANN, LANDON and CULLEN, JJ., concur.

Judgment affirmed.

IRVING T. BUSH, Appellant, v. JOHN O'BRIEN et al., Respondents, Impleaded with Others.

1. NEW YORK CITY — UNAUTHORIZED OFFER OF JUDGMENT BY CORPORATION COUNSEL — TAXPAYER'S ACTION. The corporation counsel of the city of New York has no power, either by virtue of his retainer or under the charter (L. 1897, ch. 378, § 255), to make an offer of judgment in an action against the city, and his affidavit under section 740 of the Code of Civil Procedure that he is duly authorized to make it in behalf of the party, is "an illegal official act" within the clear wording of the statute (L. 1892, ch. 801), authorizing a taxpayer to bring an action "to prevent any illegal official act on the part of any officer of any \* \* \* municipal corporation in the state," and an action may be maintained thereunder to restrain the judgment creditors from collecting and the comptroller from paying a judgment entered upon such offer.

2. TAXPAYER CANNOT INTERPOSE AND APPEAL IN ACTION AGAINST THE CITY. A taxpayer has no right to interpose and appeal in an action

164	205
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164	205
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164	205
77	AD*502

in which a person has obtained a judgment against a city on a claim for damages.

3. **TAXPAYER'S ACTION TO RESTRAIN ILLEGAL OFFICIAL ACT — PROOF REQUIRED.** In order to maintain a taxpayer's action to restrain the collection and payment of a judgment entered against the city on an offer of judgment by the corporation counsel, upon the ground that his affidavit that he was duly authorized to make such offer was an illegal official act, it is not necessary for the plaintiff to show that the city was not justly indebted in the amount stated in the judgment, since the action is brought under the provision of the statute authorizing a taxpayer's action to prevent an "illegal official act" and not under the provision authorizing an action "to prevent waste."

4. **APPEAL — WHEN QUESTION IS NOT ACADEMIC.** An enactment by the legislature prohibiting in express terms the corporation counsel of the city of New York from making an offer of judgment against the city, does not render the question of the power of a corporation counsel to confess judgment academic as to cases arising prior to its passage or as to cases arising in other cities of the state.

*Bush v. O'Brien*, 47 App. Div. 581, reversed.

(Argued June 5, 1900; decided October 2, 1900.)

**APPEAL**, by permission, from an interlocutory judgment of the Supreme Court, entered April 9, 1900, upon an order of the Appellate Division in the first judicial department, made February 9, 1900, affirming a judgment sustaining a demurrer to the complaint, entered upon a decision of the court on trial at Special Term.

The nature of the action, the question certified and the facts, so far as material, are stated in the opinion.

*Frederic R. Kellogg* for appellant. The statutes permit a taxpayer to obtain redress for any illegal official act, whether resulting in a judgment or otherwise, and do not require any proof of fraud or collusion. (*Osterhoudt v. Rigney*, 98 N. Y. 223; *Talcott v. City of Buffalo*, 125 N. Y. 280; *Ziegler v. Chapin*, 126 N. Y. 342; *Rogers v. O'Brien*, 153 N. Y. 357; L. 1892, ch. 301; *Ayres v. Lawrence*, 59 N. Y. 192; *Warrin v. Baldwin*, 105 N. Y. 537; *Peck v. Belknap*, 130 N. Y. 398; *Parfitt v. Ferguson*, 3 App. Div. 183; *Blaschko v. Wurster*, 156 N. Y. 437; *Barr v. Denniston*, 19 N. H. 180.) The motion made by the corporation counsel upon other grounds than those herein advanced to set aside these judg-

ments is no bar to the maintenance of this action. (Freeman on Judgm. § 511; *Riggs v. Purcell*, 74 N. Y. 370; *Keck v. Werder*, 86 N. Y. 264; *Dutton v. Smith*, 10 App. Div. 566; *Blank v. Blank*, 107 N. Y. 91; *York v. Texas*, 147 U. S. 15; *Ashton v. City of Rochester*, 133 N. Y. 193.) No power would exist in any private attorney, by virtue of his retainer, and without the express approval of his client, to enter into any such compromise agreement or to make any such offers of judgment. (Code Civ. Pro. § 1274; *Mandeville v. Reynolds*, 68 N. Y. 540; *Barrett v. T. Ave. R. R. Co.*, 45 N. Y. 628; *Lewis v. Duane*, 141 N. Y. 314; 3 Am. & Eng. Ency. of Law, 362.) Under the provisions of the Consolidation Act, in force at the time of the entry of these judgments, the corporation counsel not only received no express grant of greater power than that of a private attorney with regard to the settlement, adjustment and compromise of claims and the making of offers of judgment, but, on the other hand, such powers were specifically lodged in the comptroller. (L. 1882, ch. 410, § 123; *McGinness v. Mayor, etc.*, 26 Hun, 142.) The corporation counsel did not possess greater powers to compromise claims, etc., than a private attorney. (*O'Brien v. Mayor, etc.*, 40 App. Div. 331; *People ex rel. v. Mayor, etc.*, 11 Abb. Pr. 66; *Collins v. Vil. of Saratoga Springs*, 70 Hun, 587; *Bank of Commerce v. Louisville*, 88 Fed. Rep. 403; *L. T. Co. v. Stone*, 88 Fed. Rep. 408; *R. R. Co. v. Stephens*, 36 Mo. 150; *Ohlquest v. Farwell*, 71 Iowa, 231; *Stone v. Bank of Commerce*, 174 U. S. 412.) No such power in the corporation counsel can be established by inferences from the provisions of the Consolidation Act; and on the contrary all such inferences support our contention. (*Vil. of Fort Edward v. Fish*, 156 N. Y. 372; *Collins v. Vil. of Saratoga Springs*, 70 Hun, 586; *District of Columbia v. Bailey*, 171 U. S. 176.)

*L. Laflin Kellogg* and *Alfred C. Petté* for respondents. In the absence of any allegation of fraud and collusion between the parties in the concoction of the judgments entered they were not void, but at most voidable on the ground of irregularity.

(*O'Brien v. Mayor, etc.*, 40 App. Div. 331; *Pray v. Hege-*  
*man*, 98 N. Y. 351; *Marsh v. Masterson*, 101 N. Y. 406;  
*Bell v. Merrifield*, 109 N. Y. 202; *C. P. Co. v. Walker*, 114  
N. Y. 7; *Lorillard v. Clyde*, 122 N. Y. 41; *Culrose v. Gib-*  
*bons*, 130 N. Y. 447; *Talcott v. City of Buffalo*, 125 N. Y.  
280; *B. C. Inst. v. Bitter*, 87 N. Y. 250; *Bogardus v. N. Y.*  
*L. Ins. Co.*, 101 N. Y. 328.) The plaintiff, suing in his capac-  
ity as a taxpayer of the city of New York, is equally bound  
by the decision rendered on the former motion as if he had  
been a party to that motion. (1 Dillon on Mun. Corp. 70,  
§ 40; *Alexander v. Donohue*, 143 N. Y. 203; *Ashton v. City*  
*of Rochester*, 133 N. Y. 187.) There is not even an allegation  
of fraud or collusion between the parties in the making of the  
compromise and settlement referred to in the complaint, and  
in the absence of such allegations, the plaintiff, as a taxpayer,  
is not entitled to maintain this action in any event. (*Talcott*  
*v. City of Buffalo*, 120 N. Y. 280; *Ziegler v. Chapin*, 126  
N. Y. 342; *Rogers v. O'Brien*, 153 N. Y. 357.) The plain-  
tiff is not entitled to maintain this action in any event because  
there are no facts alleged which show that the alleged illegal  
official acts involved a waste of the city's funds. (*O'Brien v.*  
*Mayor, etc.*, 40 App. Div. 331; *Rogers v. O'Brien*, 153 N. Y.  
357; *Talcott v. City of Buffalo*, 125 N. Y. 280.) The coun-  
sel to the corporation was the proper officer of the mayor,  
aldermen and commonalty of the city of New York to make  
compromise and settlement of suits pending against it. (L.  
1900, ch. 284; *O'Brien v. Mayor, etc.*, 40 App. Div. 331;  
160 N. Y. 35; *Bush v. Coler*, 24 Misc. Rep. 368; *Mark v.*  
*City of Buffalo*, 87 N. Y. 184; *People ex rel. v. Common*  
*Council*, 85 Hun, 601; *People v. Stephens*, 52 N. Y. 306;  
*People ex rel. v. Coler*, 34 App. Div. 167; *McGinness v.*  
*Mayor, etc.*, 26 Hun, 144; *City of Johnstown v. Rodgers*,  
20 Misc. Rep. 262; *Matter of Lorillard*, 13 N. Y. Supp. 83;  
*Stone v. Bank of Commerce*, 174 U. S. 409.)

HAIGHT, J. The defendants O'Brien, Clark and Brown  
interposed a demurrer to the plaintiff's complaint upon the

ground that it does not state facts sufficient to constitute a cause of action, and the question certified is, does the complaint state sufficient facts, etc.

The action was brought by the plaintiff as a taxpayer of the city of New York to restrain the demurring defendants from collecting, and the comptroller of the city from paying, certain judgments which the demurring defendants had obtained against the city of New York, amounting in the aggregate to \$700,000.00. The complaint alleges that these judgments were obtained and entered upon offers executed and verified by the corporation counsel and accepted by the demurring defendants. The complaint further alleges that the offers of the judgments made by the corporation counsel were not authorized by the comptroller, the mayor or by the aldermen and commonalty of the city; that the corporation counsel had no authority or power to make the offers, and that the judgments entered thereupon were illegal and void.

The first and, to our minds, the important question raised for review relates to the power of the corporation counsel. He appears to have made the offers to allow judgments to be entered in the actions then pending against the city, pursuant to the provisions of section 738 of the Code of Civil Procedure, which authorizes the defendant, before trial, to serve upon the plaintiff's attorney a written offer to allow judgment to be taken against him for a sum specified. Section 740 of the Code provides that "Unless an offer or an acceptance made as prescribed in either of the last four sections is subscribed by the party making it, his attorney must subscribe it, and annex thereto his affidavit, to the effect, that he is duly authorized to make it, in behalf of the party." This provision of the Code appears to have been complied with, the corporation counsel verifying the offer made by him. The papers, therefore, upon which the judgments were entered all appear to be regular and upon their face show valid judgments. It is charged, however, in the complaint that the corporation counsel, in fact, had no authority to make the offers, and, consequently, his affidavit to the effect that he was authorized was false.

If the verification by the corporation counsel was false, it was an illegal act on his part, and the case is brought within the clear wording of the statute which authorizes a taxpayer to bring an action "to prevent any illegal official act" on the part of any officer of any county, town, village or municipal corporation in the state. (Laws 1892, chapter 301.) The question presented does not call for a review of a board of audit, or of a board of assessors, or other judicial body who have passed upon the merits of a claim, such as was considered in the case of *Osterhoudt v. Rigney* (98 N. Y. 222) and other kindred cases, but is limited to the question of power. If the corporation counsel had no authority to make the offers, he had no power do so. If he had no power to make them, it, of necessity, follows that the judgments were not only irregular, but were unauthorized.

In the first place, as bearing upon the power of an attorney to make an offer of judgment, we have the very significant provisions of section 740 of the Code above quoted. By its provisions, if the offer is not signed by the party it must be by his attorney, and he must annex thereto his affidavit to the effect that he is authorized by the party to make the offer, thus indicating that the authority to make the offer must be other than that of the ordinary retainer by a party to prosecute or defend an action. If the attorney has the power to make or accept an offer of judgment by virtue of his retainer, then the provision of the Code requiring him to annex his affidavit is useless and unnecessary. But we think this question has been settled in this state and that the Code but recognized the existing rule. In the case of *Gaillard v. Smart* (6 Cowen, 385), SAVAGE, Ch. J., delivered the opinion of the court, holding that while an attorney, by virtue of his retainer, had the power to discontinue an action, he had no power to release the cause of action. In *Barrett v. Third Avenue R. R. Co.* (45 N. Y. 628, 635), ALLEN, J., says: "The authority of the attorney does not extend to a compromise or release. He may discontinue an action, because that relates to the conduct of the suit, and is within his retainer, and not



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to the cause of action. An attorney cannot settle a suit and conclude the client in relation to the subject in litigation, without his consent." (Citing *Shaw v. Kidder*, 2 How. Pr. 244; *Lewis v. Gamage*, 1 Pick. 347.) In the case of *Beers v. Hendrickson* (45 N. Y. 665, 669), GROVER, J., says "An attorney is not authorized by his retainer to satisfy a judgment without payment, and if he does so, the court will set such satisfaction aside." In *Mandeville v. Reynolds* (68 N. Y. 528, 540), FOLGER, J., in delivering the opinion of the court, after referring to the ruling of the court below to the effect that the attorneys in the action had no power to compromise the judgment and release the defendant unless authority was expressly given to them by the plaintiff, says: "In holding thus, I think that the court was right. An attorney is not authorized by his retainer to satisfy a judgment without payment, and if he does so, the satisfaction will be set aside. The authority of an attorney does not extend to a compromise or a release. He cannot settle a suit, and conclude his client in relation to the subject in litigation without consent of the latter." In *Arthur v. Homestead Fire Insurance Co.* (78 N. Y. 462) it was held not to be within the scope of the authority of an attorney in an action to change the rights of his client except so far as it may be done in the action. He cannot justify the commencement of another action or create a cause of action against his client which did not before exist. In *Lewis v. Duane* (141 N. Y. 302) it was held that an attorney employed to foreclose a mortgage has no implied authority in the matter to compromise the rights of his client and make nugatory the duty he was employed to perform.

There are numerous other cases which might be cited of the same import, but we think those referred to justify our previous assertion, that the question has long been settled. It is claimed, however, that the powers of a city attorney, or corporation counsel, differ from those of an attorney employed by an individual. They undoubtedly do if the charters under which they are elected or appointed gives to them greater or

different powers, otherwise not. This question has also been considered by the courts. In the case of *Taylor v. Mayor, etc.* (11 Abbott's Pr. 66), it was held that the corporation counsel of the city of New York had no larger powers, as such, to bind his client than those connected with the ordinary relations of attorney and client. And very recently, in the Supreme Court of the United States, in the case of *Stone v. Bank of Commerce* (174 U. S. 412, 423), PECKHAM, J., in delivering the opinion of the court, says: "We are also of the opinion that, as city attorney, he had no greater power to bind the city by that agreement than would an attorney have in the case of an individual."

We are thus brought to a consideration of the charter of the city of New York. Section 255 creates a law department, the head of which shall be called the corporation counsel, "who shall be the attorney and counsel for the city of New York, the mayor, the municipal assembly and each and every officer, board and department of said city." It further provides that he shall "have charge and conduct of all the law business of the corporation and its departments and boards, and all law business in which the city of New York is interested." There are other special powers given to him with reference to the opening of the streets, etc., which have no bearing upon the question under consideration. If he has any power to settle and audit claims against the city, it must be found in the provisions of the charter quoted. A careful examination of these provisions fails to satisfy us that the legislature intended to invest the corporation counsel with any other or greater power than that of an attorney employed by an individual to take charge of his legal business. The charter also has created a finance department, of which the comptroller is the head, to whom has been given the express power "to settle and adjust all claims in favor of or against the corporation, and all accounts in which the corporation is concerned as debtor or creditor." (Section 149.) The power to settle and adjust, therefore, appears to have been vested in the comptroller, and not in the corporation counsel. This con-

struction leaves each officer supreme in his own department. The comptroller determines whether a claim shall be compromised or not; if it is not compromised, the corporation counsel has the supreme power of determining the nature of the defense that shall be interposed to any action that shall be brought thereon, but not to compromise. If it had been intended to give the corporation counsel power to compromise claims rejected by the comptroller, without his knowledge or consent, then the corporation counsel would, in effect, become the superior of the comptroller, for all of the comptroller's determinations with reference to the audit of claims would be subject to review by the corporation counsel. Clearly this was not intended.

It is claimed that we held otherwise in the case of *O'Brien v. Mayor, etc.* (160 N. Y. 691). We do not so understand that decision. That case is reported below in 40 App. Div. 331. The facts, as stated in the opinion, are to the effect that the settlement was made by the corporation counsel "with the assent, approval or acquiescence first obtained of every municipal officer and department having to do with the subject, or having knowledge of the question involved, or who were competent to aid the city in reaching a conclusion as to whether it was wise to make a compromise, and for what amount." The question certified to this court in that case is as follows: "Had the counsel to the corporation, with the concurrence and upon the recommendation of the mayor, the comptroller and the aqueduct commissioners, the chief engineer of the aqueduct commission and the special counsel retained by the city in the particular case, power to offer to confess judgment against the defendants in an action brought to recover an amount claimed to be due to plaintiffs upon a contract, made under chapter 490, Laws of 1883, and where there was an actual controversy between the contractors (the plaintiffs in the action) and the defendants as to the amount due the plaintiffs under the said contract for a sum of money very much less than that claimed by the plaintiffs in the action, and where the counsel to the corporation and the other public

officials named, being all of the public officials who had any authority or power under the statute creating the aqueduct commissions or under the other statutes in force at the time the offer was made in relation to the subject-matter of the contract, approve of the offer of judgment as a settlement of the controversy advantageous to the city of New York, and where, as a fact, such a settlement was advantageous to the city, the offer of judgment having been made and accepted by the plaintiffs and judgment entered thereon upon the 27th day of December, 1897?" The question was answered by us in the affirmative, and properly so, for in the question it distinctly appears that the compromise was made with the concurrence of the comptroller, etc.

The Appellate Division appears to have entertained an impression that a taxpayer had the right to interpose and appeal in an action in which a person has obtained a judgment against the city on a claim for damages. We know of no such authority. This is not an action in which the plaintiff is seeking to set aside an assessment against his own property and thus remove a cloud therefrom, but is brought under the statute to restrain an official illegal act.

It is contended that the question discussed as to the power of the corporation counsel to confess or make offer of judgment against the city is purely academic, so far as this court is concerned, for the reason that the legislature has enacted that he shall not have it. It appears, however, that the judgment in this case was entered, and, if report be true, numerous other transactions of a similar character took place, before the legislature took action in the matter. The act was local, having reference to the city of New York, and certainly the question cannot be academic in so far as it is involved in this case, or in other cases arising before the passage of the act, or in other cities of the state.

It is also contended that a taxpayer cannot maintain an action to restrain the payment of a judgment against the city without showing that the city was not justly indebted in the amount stated in the judgment. If this be so, then a treas-

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urer who is authorized by statute to pay out the money in his custody only upon a warrant of the comptroller, should he see fit to disregard the statute and pay over the public moneys upon the order of any other officer, thus completely ignoring the comptroller, the taxpayers could not interfere to restrain his unlawful acts. The statute under which this action was brought authorizes a taxpayer to bring an action to prevent waste, and also to prevent an official illegal act. If the action was based upon the provision of the statute "to prevent waste," then it would be necessary to show that the city was not justly indebted in the amount stated in the judgment, for if it was, there could be no waste. This action, however, was brought under the other provision of the statute, to prevent an official illegal act. The act complained of, as we have seen, was a false affidavit made by the corporation counsel. He may have supposed that he had authority to make it and intended no wrong. Still, if the allegations of the complaint are true, it was, in fact, false, and as such was a constructive fraud upon the public.

The question certified should be answered in the affirmative, the interlocutory judgment reversed and the demurrer overruled, with costs in all the courts, with leave to the defendants to answer in twenty days upon payment of the costs.

PARKER, Ch. J. (dissenting). The question whether the corporation counsel should, or not, have the power to confess judgments against the city is purely an academic one, so far as this court is concerned, for the legislature has enacted that he shall not have it. Hence, there is no excuse for straining in order to establish the same rule by decision, for the enactment of the legislature is as effective without as with a decision of this court. And yet such a holding is vigorously contended for, although its accomplishment would create a precedent hitherto unknown to our jurisprudence, viz., that a taxpayer may have a judgment against a city set aside in equity without showing that it was obtained through fraud or collusion, and without even questioning that the city was justly

indebted in an amount stated in a judgment which was rendered by a court having jurisdiction of both the parties and the subject-matter. This the city cannot do and no more can the taxpayer, for he acquires by the statute—not greater powers than the municipal authorities—but the right to do what the latter may, but neglects or wrongfully refuses to do. The purpose of the statute is to enable the taxpayer to prevent waste of the public funds, not to add to the public burdens by bringing suits to correct the pinholes in the procedure by which the rights of the city and its opposing litigants are justly determined. So the foundation of any such cause of action must rest in the fact that the municipality is about to be compelled to pay that which it does not owe, and it must be pleaded. Here there is no such allegation either in substance or effect, the complaint proceeding on the theory that it is one of the rights of a taxpayer under the statute to have a judgment set aside for a mere irregularity. That it is an irregularity of which the plaintiff complains and nothing more is apparent on the very first attempt to analyze it. To speak of the judgment as being founded on an act which was without power may at first convey an impression to the mind that, therefore, it is void; but such effect can be but momentary, for the so-called lack of power is found to be, not in the court, which had jurisdiction of both the parties and the subject-matter, but in the officer, who presumed to make and verify the offer of judgment. Some other officer than the corporation counsel should have made the admission, it is said, to wit, the comptroller. The corporation counsel supposed he had authority and made affidavit to that effect, so that the proceedings were, on their face, regular. Now, whenever it happens that judgments are entered on insufficient evidence, or without evidence, or on perjured evidence, or on admissions of counsel not authorized, the judgments are not void, they are only irregular. It is elementary law that where the court has jurisdiction of the subject-matter and the parties are before it by due service of proper process, the jurisdiction is never ousted by the erroneous exercise of the power which it confers,

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which may be of such a character as to occasion reversal on appeal, or call for an order setting it aside on motion, but the judgment is not void. (Black on Judgments, vol. I, 215, 244.) The judgments in question were not entered on confession, but in actions in the Supreme Court wherein the court had acquired jurisdiction before the offer of judgment was made, and the judgment entered thereon was valid, although it be conceded that the corporation counsel had no right to make the affidavit without the direction of the comptroller. As it is a valid judgment the taxpayer who seeks to set it aside must at least show merits. Independently of statute, it has always been the practice of our courts from the earliest times, in cases wherein the setting aside of a judgment for irregularity is sought, to require it to be shown that the judgment, as it stands, is unjust and the defense meritorious. This complaint shows nothing of the kind. It does not allege that the city has suffered, or will sustain, injury because of the entry of the judgment, nor is it even hinted in the complaint that the entry of the judgment was due to fraud or collusion. To have proved all the facts alleged in the complaint, therefore, would not have entitled the plaintiff to a judgment setting aside the judgment complained of, and, hence, the demurrer to it was properly sustained.

While concurring generally in the views expressed by Judge O'BRIEN, I desire, by this memorandum, to call special attention to a rule of universal application, the integrity of which is now threatened.

O'BRIEN, J. (dissenting). The plaintiff, as a taxpayer of the city of New York, brought this action against the city and the comptroller, in his official capacity, to restrain them from paying certain judgments recovered against the city by the other defendants composing the firm of O'Brien & Clark and Brown, Howard & Co. All of the defendants interested in the judgments demurred to the complaint on the ground that it did not state a cause of action. The demurrer has been sustained in the courts below, and the only question

involved in the appeal to this court is whether, upon the facts appearing on the face of the complaint, the plaintiff has any cause of action.

The complaint contains the necessary averments to qualify the plaintiff as a taxpayer, and then states the following facts:

(1) That the several defendants representing the firms named procured judgments to be entered in the Supreme Court on the 27th of December, 1897, for various sums, which are separately stated, amounting in the aggregate to \$700,000.

(2) That the judgments were entered upon claims arising out of the construction of the new aqueduct.

(3) That said judgments were entered in actions in favor of the said firms and the members thereof against the city upon offers of judgment for the respective amounts stated in each case executed and verified by the corporation counsel in behalf of the city, claiming to have authority in that behalf; that the offers were accepted by the parties so bringing the actions, and upon such offers and acceptances the judgments were entered.

(4) That the judgments were not entered by any other authority, and upon information and belief the corporation counsel had no power to make the offers and that his acts in that respect are void.

(5) That the parties procuring the judgments had demanded payment of the same from the comptroller and had threatened to commence legal proceedings to collect and enforce the same, to the damage of the city and the waste of its estate.

(6) It is averred, upon information and belief, that the corporation counsel has been requested to move in said actions to vacate the judgments upon the ground "hereinbefore stated," but that he has not done so, and the motion was based on other grounds to the exclusion of the grounds "herein set forth," and that the motions were denied and the order denying the same affirmed on appeal, and, upon information and belief, that the plaintiff has no other remedy at law or in equity to prevent the injury complained of. Then fol-



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lows the demand for relief, to the effect that the several judgments be vacated and that an injunction issue restraining the payment thereof.

It is believed that every material fact contained in the complaint is embraced in the foregoing statement. It is not alleged or claimed that there was any collusion, fraud or bad faith in the transaction on the part of any one. It is not even alleged that the claims upon which the judgments were entered were infected with any vice whatever, or that they were not justly due to the claimants. The plaintiff's sole claim is, not that the judgments or any of them are founded upon any illegal, fraudulent or unjust demand, or that the creditors or the city officers who made the offer of judgment acted fraudulently or collusively, but that the judgments were not regularly entered, since the corporation counsel was without power to make the offer. The relief demanded is solely against an irregular judgment, and whether it is such or not is a matter of law depending upon the power of the corporation counsel as an attorney and a public official. There is no law that permits a taxpayer to interfere by action to vacate a judgment against a city solely on the ground of some irregularity in the procedure by which it was entered.

For aught that appears in the complaint the corporation counsel offered to allow judgment in an action against the city founded upon a just and valid claim, to which the city had no defense. When a party applies to the court to open a judgment by default, or to set it aside for irregularity, he is ordinarily required to furnish an affidavit of merits, and certainly no less should be required of a taxpayer who invokes the powers of a court of equity to vacate a judgment, not against himself but the city of which he is a member. He should be required at least to allege that the judgment which he proposes to attack, or the claim upon which it is founded, is infected with fraud or illegality, or that the city has some meritorious defense to the same. The plaintiff's complaint is silent on all these points. It does not even show that the judgment was irregularly or improperly entered, but it does

show just the contrary. It appears that the judgment was entered upon an offer by the corporation counsel, under the provisions of sections 738 and 740 of the Code. These provisions required the corporation counsel to prove to the court that he was authorized to make the offer, and the complaint alleges that he complied with the statute, since it is averred in substance that the offer was accompanied by the usual verification. Certainly the complaint does not aver a non-compliance with these provisions of law, and without the complaint the presumption is that the proper proof was made to authorize the entry of the judgment. So that the judgment described in the complaint is, upon its face, entirely regular, and the authority of the corporation counsel to make the offer, being mere matter of proof, is adjudicated by the judgment itself. What the plaintiff proposes now to do is to show in some way *dehors* the record itself that there was no authority to make the offer and thus to contradict it. The complaint avers, as we have seen, that the judgment was entered without authority, which is not a fact, but a legal conclusion, and is so treated by the learned counsel for the plaintiff in his argument. (*Talcott v. City of Buffalo*, 125 N. Y. 280; *B. C. Institute v. Bitter*, 87 N. Y. 250; *Bogardus v. N. Y. L. Ins. Co.*, 101 N. Y. 328.) His contention is that the counsel to the corporation, though possessing all the powers of an attorney in an action, superadded to those conferred upon him by statute as a public officer, had no power to offer judgment in a pending action. The statute devolved upon him full charge of all the law business of the city, and designates him as an officer upon whom all legal process against the city may be served. Certainly the power to make the offer was not conferred upon any other officer, board or body, and if it was not possessed by the head of the law department of the city it did not and could not exist at all.

The duty imposed upon him exclusively to have charge of all the law business of the city necessarily involved the exercise of judgment and discretion, and embraces the power to offer judgment when, in his opinion, that course was for the

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best interest of the city. It is said that the power is liable to be abused, but so is every power conferred upon a public officer. The argument that power may be abused does not prove that the power does not exist, and the learned counsel for the plaintiff has failed to point out any other officer, department or body, connected in any way with the city government, where the power could be more safely or properly lodged, or where it would be more likely to be exercised in the interests of the city.

But since this court has expressly affirmed the existence of this power in the corporation counsel, as we shall see hereafter, it is unnecessary to discuss this feature of the case upon principle, but it may be well to view it in another aspect. It is established law that a judgment cannot be attacked by a suit in equity on the ground that it was entered without authority, but the proceeding must be by motion in the action. (*Vilas v. P. & M. R. R. Co.*, 123 N. Y. 440, and cases there cited.) It appears on the face of the complaint that the city did avail itself of that remedy through all the courts and failed. The motion was made upon all the facts that appear in the complaint, with many others that do not appear. Not only was the question of authority involved in the motion, but the merits of the claims upon which the judgment is based as well, and the motion was denied, and that order was affirmed in this court. (*O'Brien v. Mayor, etc.*, 40 App. Div. 331; *affd.*, 160 N. Y. 691.) The plaintiff now proposes to take up the case where the city was compelled to leave it and litigate the whole matter over again. Of course, if the plaintiff is not concluded by the decision against the city made without collusion or fraud, then there is no reason why some other taxpayer may not take up the case and litigate the whole matter again should the plaintiff fail in this action, and thus the controversy would be continued indefinitely. The plaintiff as a taxpayer has no rights in this action except such as are derived from some act of the city or its officers. The wrong, if any, is to the city and not to the plaintiff personally. The position of the taxpayer in such an action is analogous to that

of a stockholder in a private corporation seeking to impeach some corporate transaction. Whatever will bar or estop the city or the private corporation will bar or estop the taxpayer or the stockholder. (*Alexander v. Donohoe*, 143 N. Y. 203.)

It cannot be doubted that the final order upon the application by the city to vacate the judgment in question concludes it and is a bar to any other application for that purpose. A final order in such an application has the same effect as a judgment in an action. The city is precluded by the decision from raising any question involved or decided in that motion, or which could have been litigated or decided. These propositions are fully sustained by the authorities cited in the learned opinion below. (*Culross v. Gibbons*, 130 N. Y. 447, 454; *Ashton v. City of Rochester*, 133 N. Y. 187; *Bell v. Merrifield*, 109 N. Y. 202; *C. P. P. & M. Co. v. Walker*, 114 N. Y. 7; *Lorillard v. Clyde*, 122 N. Y. 41; *Barber v. Kendall*, 158 N. Y. 401.) The application to vacate and the decision denying the same appear upon the face of the plaintiff's complaint, and it follows that he is also concluded by the former adjudication. He cannot do what the city is estopped from doing. If he had alleged that the former proceeding was fraudulent or collusive then the effect might be different, but he did not and presumptively could not.

It is said that this action is based upon narrower ground than the motion by the city to vacate. The only difference in the two applications is that the former presented all the facts and circumstances to the court, while the present one presents only a part of them. But surely that cannot change the effect of the decision against the city. If there was no authority in the corporation counsel to offer judgment, then the city ought to have succeeded in the motion, but since it failed the point must have been decided adversely to it, and so it appears from the decision which was adopted by this court. (*O'Brien v. Mayor, etc., supra.*) Moreover, it has been held in other cases that a motion of that character made by the city, when finally decided, binds not only the immediate parties but the citizens and taxpayers as well.

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They are deemed to be represented by the city in the proceedings, and in the absence of fraud or collusion are bound as effectually as the city itself. (*Ashton v. City of Rochester*, *supra*; *Osterhoudt v. Rigney*, 98 N. Y. 223; *Rogers v. O'Brien*, 153 N. Y. 357.)

This case involves much more than the narrow question concerning the power of the corporation counsel to offer judgment in a pending action, even if it was still an open one and not conclusively settled against the plaintiff, as I think it is by the decision of this court in this and other cases. (*O'Brien v. Mayor, etc.*, *supra*; *Mark v. City of Buffalo*, 87 N. Y. 184; *People v. Stephens*, 52 N. Y. 306; *People ex rel. Burby v. Common Council*, 85 Hun, 601.) The legislature has just changed the law in that respect — a clear recognition of the fact that it was otherwise before. (Chap. 284, Laws of 1900.)

But the plaintiff's complaint is defective in the other particulars which have been pointed out, even if the plaintiff could impeach the judgment record and the affidavit of the corporation counsel as to his authority to make the offer, a proposition that is more than doubtful in the absence of any allegation of fraud. Conceding every fact alleged, they furnish no ground for an action in behalf of a taxpayer to impeach the judgment, and, moreover, it appears from the complaint that the plaintiff is seeking to litigate questions already decided against the city, and consequently against the citizens and taxpayers, since they constitute the city. (1 Dillon on Munic. Corp., sec. 40.)

For these reasons the judgment should be affirmed, with costs, and the question certified answered in the negative.

BARTLETT, VANN and CULLEN, JJ., concur with HAIGHT, J., for reversal; PARKER, Ch. J., and O'BRIEN, J., read for affirmance, and LANDON, J., concurs.

Judgment reversed, etc.

AMOS W. MORGAN, Respondent, v. ARTHUR E. HEDSTROM  
et al., Appellants.

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171 \*191

1. STOCK CORPORATION LAW — CONSTRUCTION OF § 30. The provision of section 30 of the Stock Corporation Law (L. 1892, ch. 688) which declares that if the annual report required by the law is not made and filed, the directors shall jointly and severally be personally liable for all the debts of the corporation then existing, is remedial, and, if necessary, should be liberally and not narrowly construed so as to embrace the debts within the language of the act, however strictly it may be construed as to the acts of the directors constituting their alleged default, or as to the evidence of debt of the corporation; and corporate bonds secured by a mortgage upon a corporation's real estate are within the meaning and intent as well as within the language of such provision.

2. LIMITATION OF ACTION TO ENFORCE PENALTY. The cause of action to enforce the penalty prescribed for failure to file the annual report required by law, on account of a default, made before the maturity of the bonds or interest coupons for the amount of which it is sought to hold the directors, accrues at the dates respectively of the maturity of the coupons and the bonds, as to the directors then in office; and the liability of a director, whose election and default in filing the report occurs after the maturity of the debt, attaches at the time his default is complete, since the debt is "then existing;" and if the action is begun within three years from the earlier date it is within the limitation prescribed by section 394 of the Code of Civil Procedure.

3. LIABILITY OF DIRECTORS FOR SUCCESSIVE FAILURES TO FILE ANNUAL REPORT — JOINDER OF NEW DIRECTORS. Successive defaults in making and filing reports by the same directors do not renew as to them the penalty already incurred under section 30, but when a new member comes into the board a new default makes him jointly and severally liable for the debts "then existing," that is, he becomes jointly liable with the old members of the new defaulting board; and a single action may be maintained against both the old and new directors if brought before the Statute of Limitations bars the liability of either.

4. EFFECT OF THE PARTICIPATION AS DIRECTOR IN PREVIOUS DEFAULTS BY THE VENDOR OF BONDS. That the vendor of corporate bonds was at the time of the sale a director of the corporation and was participating with the other directors in the default in filing the annual report, and, therefore, could not enforce the penalty prescribed by section 30 against his co-directors, does not prevent the purchaser of the bonds from enforcing the penalty on account of a subsequent default by them in which the vendor also participated.

5. MISTAKE OF DATE AT WHICH DIRECTORS INCURRED PENALTY. A mistake by the plaintiff in an action to enforce the penalty prescribed by

section 30 for failure of directors to file the annual report, in alleging the date at which the penalty was incurred, due to a mistake as to the date the law fixes, is not reversible error if within the true dates the plaintiff has shown his right to recover.

*Morgan v. Hedstrom*, 25 App. Div. 547, affirmed.

(Argued June 14, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Supreme Court, entered February 14, 1898, upon an order of the Appellate Division in the fourth judicial department, overruling defendants' exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial, and directing judgment for plaintiff upon a verdict directed by the trial court.

The nature of the action and the facts, so far as material, are stated in the opinion.

*John G. Milburn* and *William A. Douglas* for appellants. The provisions of section 30 of the Stock Corporation Law and of section 12 of the Manufacturing Act of 1848 have been uniformly held to be highly penal, and, therefore, subject to the strictest interpretation. (*Garrison v. Howe*, 17 N. Y. 458; *Wiles v. Suydam*, 64 N. Y. 173; *Cameron v. Seaman*, 69 N. Y. 396; *Bruce v. Platt*, 80 N. Y. 379; *Stokes v. Stickney*, 96 N. Y. 323; *Whittaker v. Masterton*, 106 N. Y. 277; *Mitchel v. Hotchkiss*, 48 Conn. 20; *Breit-ung v. Lindhauer*, 37 Mich. 230; *Chase v. Curtis*, 113 U. S. 458; *W. A. Co. v. Barlow*, 68 N. Y. 34.) It was not the legislative intent to embrace within the scope of the penal provisions of section 12 of the Manufacturing Act, or section 30 of the Stock Corporation Law, obligations like those in question, viz., bonds of the corporation running for a long period of years and secured by mortgage upon the entire property of the corporation, subscribed for and taken wholly upon the strength of such security, and they are not such an indebtedness as is within the statute and can be recovered from a director by reason of his omission to file an annual report. (*Jones v. Barlow*, 62 N. Y. 208; *Bruce v. Platt*, 80 N. Y.

386; *S. & H. Q. Co. v. Bliss*, 27 N. Y. 297; *Thomp. on Corp.* § 4222; *S. E. Co. v. Hubbard*, 101 U. S. 188; *P. S. Co. v. Cornell*, 86 Hun, 319; *Vernon v. Palmer*, 16 J. & S. 231; *Carr v. Risher*, 50 Hun, 148; *Losee v. Bullard*, 79 N. Y. 404; *Rector v. Vanderbilt*, 98 N. Y. 174; *Chapman v. Comstock*, 58 Hun, 325.) The defendant Hedstrom was not in January, 1896, or at any other time, a stockholder in this corporation, and was not, therefore, a director or trustee. (*Matter of Newcombe*, 42 N. Y. S. R. 442; *Craw v. Easterly*, 4 Lans. 513; *C. Nat. Bank v. Colwell*, 132 N. Y. 250; *Beardsley v. Johnson*, 121 N. Y. 224; *Bruce v. Platt*, 80 N. Y. 379; *Matter of N. S. & S. I. F. Co.*, 65 Barb. 371; *Matter of Elias*, 17 Misc. Rep. 718; *Bainbridge v. Smith*, L. R. [41 Ch. Div.] 462; *Tunis v. II., etc., R. Co.*, 149 Penn. St. 70.) The liability of an individual director respecting a particular debt when once it has attached by failure to file the annual report is not renewed or extended by subsequent or successive defaults, neither do the latter create against him a new cause of action as to such indebtedness. (*Losee v. Bullard*, 79 N. Y. 404; *Rector, etc., v. Vanderbilt*, 98 Hun, 174; *Chapman v. Comstock*, 58 Hun, 325; *Cornell v. Roach*, 11 Wkly. Dig. 528; *Jones v. Barlow*, 62 N. Y. 202, 206; *P. S. Co. v. Cornell*, 86 Hun, 319, 324; *Vernon v. Palmer*, 16 J. & S. 231; *Carr v. Risher*, 50 Hun, 148.) There was no obligation on the part of the directors of this corporation to file any report in 1896, in view of the fact that the company, for some years previous to that time, had ceased practical operations in its business. (*Bruce v. Platt*, 80 N. Y. 379.) The bonds in suit having been acquired from a trustee who could not enforce this liability against co-trustees, his transferees obtained no larger rights than he had. (*C. Nat. Bank v. Colwell*, 14 Daly, 361; *Knox v. Baldwin*, 80 N. Y. 610; *McClave v. Thompson*, 36 Hun, 367; *Easterly v. Barber*, 65 N. Y. 252.) The three years' Statute of Limitations had run against the claim herein prior to the commencement of this action, and especially as to the interest upon these bonds which accrued prior to August, 1893. (*Merchants'*



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Points of counsel.

*Bank v. Bliss*, 35 N. Y. 412; *W. A. Co. v. Barlow*, 63 N. Y. 62.)

*Norris Morey* and *Thomas R. Stone* for respondent. The trustees of the corporation are jointly and severally personally liable for all the debts of the corporation then existing upon failure to file the report required by section 30 of the Stock Corporation Law, and they may be sued together or one trustee held responsible for all the debts, nor is it necessary to recover a judgment against the corporation before proceeding against the trustees. (*Roach v. Duckworth*, 95 N. Y. 391; *Rector, etc., v. Vanderbilt*, 98 N. Y. 170; *Green v. Easton*, 74 Hun, 329; *Ross v. Shadwick*, 9 App. Div. 311; *C. Mfg. Co. v. Reamer*, 14 App. Div. 408; *M. R. & F. Co. v. Baker*, 16 App. Div. 581; 153 N. Y. 687; *S. H. Co. v. Bliss*, 27 N. Y. 297; *Vincent v. Sands*, 42 How. Pr. 231.) The trustees of a corporation are liable for "all the debts" of the corporation upon their failure to make and file the annual report. (*Palmer v. Van Santvoord*, 153 N. Y. 615; *People v. B. S. & C. Co.*, 131 N. Y. 140; *M. R. & F. Co. v. Baker*, 16 App. Div. 583; *Allen v. Clark*, 108 N. Y. 269; *Roach v. Duckworth*, 95 N. Y. 397; *Adams v. Mills*, 60 N. Y. 533; *Jones v. Barlow*, 62 N. Y. 202; *Lee v. Jacobs*, 38 App. Div. 531; *Boughton v. Otis*, 21 N. Y. 261; *Vincent v. Sands*, 1 J. & S. 511; 58 N. Y. 673.) No cause of action had accrued to this plaintiff against the defendants before the repeal of section 12 of the Manufacturing Act of 1848 by the Laws of 1890. (*Bank v. Faber*, 1 App. Div. 341; 150 N. Y. 200; *Close v. Potter*, 155 N. Y. 145.) The bonds of the corporation held by the plaintiff became due and payable December 1, 1893, and by the failure of the trustees of the company to file the annual report in January, 1894, a cause of action accrued against the defendants Holden who were then trustees. (*Rector, etc., v. Vanderbilt*, 98 N. Y. 170; *Duckworth v. Roach*, 81 N. Y. 49; *Bruce v. Platt*, 80 N. Y. 379; *Boughton v. Otis*, 21 N. Y. 261; *Carley v. Hodges*, 19 Hun, 187; *Chapman v. Lynch*, 156 N. Y.

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551; *Blake v. Clausen*, 10 App. Div. 223; 158 N. Y. 727; *Losee v. Bullard*, 79 N. Y. 407; *Vincent v. Sands*, 42 How. Pr. 231; *Cornell v. Roach*, 101 N. Y. 373.) The fact that these bonds were acquired by the respondent through or from E. L. Hedstrom in 1884, and that he then was and continued to be a trustee until his death in 1894, is not a defense for these appellants. (*Cornell v. Roach*, 101 N. Y. 373; *Easterly v. Barber*, 65 N. Y. 252; *Knox v. Baldwin*, 80 N. Y. 610; *Briggs v. Easterly*, 62 Barb. 51; *McLean v. Thompson*, 36 Hun, 367; *Brackett v. Griswold*, 103 N. Y. 428; *Roberge v. Winne*, 144 N. Y. 712; *Cohu v. Husson*, 113 N. Y. 662.) The defendant Arthur E. Hedstrom is liable as a trustee for the non-performance of the duty of the trustees to make and file an annual report in January, 1896, as required by section 30 of the Stock Corporation Law. (*Wile & B. Co. v. R. & K. F. L. Co.*, 4 Misc. Rep. 423; *Halstead v. Dodge*, 19 J. & S. 169; *Matter of N. S. S. I. Ferry Co.*, 63 Barb. 556; *Beardsley v. Johnson*, 121 N. Y. 228.) There was nothing in the condition of the corporation which excused the directors from making and filing their annual report in January, 1896. (*Kincaid v. Dwinelle*, 59 N. Y. 548; *Hollingshead v. Woodward*, 107 N. Y. 96; *Losee v. Bullard*, 79 N. Y. 407.)

LANDON, J. The plaintiff has recovered a judgment against the defendants for the amount of the principal and interest of ten bonds of \$1,000 each, issued by the Franklin Iron Manufacturing Company, a corporation organized in 1879 for the purpose of mining ore, and manufacturing iron in this state, under chapter 40 of the Laws of 1848, known as the Manufacturing Act, which bonds and the interest thereon were secured by a mortgage duly given by the company upon its real estate. Neither the company nor any of its directors ever filed any annual report. The recovery was had under section 30 of the Stock Corporation Law (Chapter 688, Laws 1892) which declares that "if such report is not made and filed, the directors shall jointly and severally be personally liable for all the debts of the corporation then existing." The

ten bonds were part of a total issue of \$120,000 issued December 1, 1883, payable ten years from date with interest semi-annually. The bonds fell due December 1, 1893, and with interest falling due June 1, 1893, and since accruing, remain unpaid. The mortgage has not been foreclosed.

The defendants contend that bonds of a corporation issued upon the security and credit of a mortgage upon the corporation's real estate are not within the meaning and intent of section 30, and, therefore, not within the section itself; that there is no need to file any report for the information or protection of creditors thus secured; that the purchaser knows the nature of his security and accepts and relies upon it; that if the bonds are not paid, he has his recourse to the mortgage; that the statute is penal in its nature, and was framed for the benefit of those dealing with the corporation, and giving it credit or further extending it in the ordinary course of business. Reference is made to the history of the legislation. When section 12 of the act of 1848 was enacted, section 2 of the same act prohibited the corporation from giving a mortgage or lien upon its property, and, therefore, the corporation could have no mortgage bond creditors. By chapter 517, Laws of 1864, the act was amended permitting the corporation to mortgage its real estate upon the written assent of stockholders owning two-thirds of its stock. This provision was extended to personal property by chapter 481, Laws of 1871, and to franchises and privileges by chapter 163, Laws of 1878. The argument is that as mortgage debts were not and could not be made under the original act of 1848, and as when such debts were authorized by subsequent legislation, they would, when contracted, be secured by the mortgage, they formed a new class with a new security, not within the spirit of the original enactment, and only constructively brought within its letter by the subsequent amendments, which, while authorizing a new class of debts upon mortgage security, failed to state that the original class protected by the annual reports was not intended to be enlarged; that the court should take notice of the sequence of the enactments, and not place a new

class of secured debts under an old statute made to protect debts not otherwise secured.

The argument of the plaintiff is the section itself, which embraces "all the debts of the corporation then existing," thus including all and excepting none. It is a settled rule of construction that an original statute and all its amendments must be read together and viewed as one act passed at the same time. (*Blake v. Wheeler*, 18 Hun, 496; *Lyon v. Manhattan R. Co.*, 142 N. Y. 298, 303; *Rogers v. Bradshaw*, 20 Johns. 735, 744.) When the courts make an exception from the letter of a statute, because the subject excepted is not within its spirit and meaning, they do so to avoid a result so unreasonable or absurd as to force the conviction upon the mind that the excepted subject could not have been intended by the legislature, and that if it had been presented to that body, it would have disclaimed any intention to include it. It will suffice to refer to *Riggs v. Palmer* (115 N. Y. 506) and *Holy Trinity Church v. U. S.* (143 U. S. 457) in which the rule is discussed and illustrated. The whole matter was revised and re-enacted in the Stock Corporation Law of 1890, and presumably if this particular exception had been overlooked in the previous enactments, it would then have been inserted. This court has held that that act declares the legislative policy in regard to the various laws embraced in the revision made by it, and that section 30 was but a continuation of prior laws. (*Bank of Metropolis v. Faber* (150 N. Y. 200). There are not lacking some considerations tending to show the propriety of including debts secured by mortgage within the class covered by section 30, and thus affirmatively supporting the legislative intent to include them. They are no less debts because secured. The court has said that the section embraces every debt of every nature. (*Roach v. Duckworth*, 95 N. Y. 397; *Jones v. Barlow*, 62 N. Y. 202; *Adams v. Mills*, 60 N. Y. 533.) If they are recovered under this provision the mortgage is either released to the greater protection of the other creditors or the directors are subrogated to the plaintiff's rights under the mortgage by virtue of subdivision 2 of sec-

tion 34 added to the Stock Corporation Law by chapter 354, Laws of 1899, which provides that "any director or officer, who, because of any such existing or future liability, shall pay any debt of the corporation, shall be subrogated to all rights of the creditor in respect thereof against the corporate property." We refer to this act as the latest evidence that the legislative construction is that mortgage debts are within the meaning of section 30, and for no other purpose. If the maturity of the mortgage debt is postponed for ten years or longer, the value of the real estate mortgaged may so depreciate as to be practically valueless as security, and, hence, the creditor may have the greater need for this remedy.

The statute gives to private corporations special franchises and privileges. As the corporation itself can have no sense of legal obligation or of common honesty or fairness, the statute makes an attempt to compel its directors, under penalty of personal liability, to communicate to the public such information about its assets and liabilities as may be useful to its creditors. The extent of this information and of the penalty for withholding it are purely of legislative cognizance. The provision is remedial and if necessary should be liberally and not narrowly construed so as to embrace the debts within the language of the act, however strictly construed as to the acts of the directors constituting their alleged default, or as to the evidence of the debt of the corporation. (*Miller v. White*, 50 N. Y. 137.) Construing section 30 according to its terms and in the light of its history, and of the intention of the legislature so far as such intention may reasonably be inferred, we find no warrant for engrafting upon it by a narrow construction the exception for which the defendants contend.

The principal of the bonds became due Dec. 1, 1893. The interest thereon falling due June 1, 1893, is unpaid, and no interest has since been paid. The principal debt of the corporation and the interest became due within the meaning of section 30, at those dates respectively, and as to the defendants Holden, the directors then in office, the cause of action for the penalty matured at the same dates. (*Jones v. Barlow*, 62

N. Y. 202; *Losee v. Bullard*, 79 N. Y. 404; *Rector of Trinity Church v. Vanderbilt*, 98 N. Y. 170; *Duckworth v. Roach*, 81 N. Y. 49.) The action was begun May 13, 1896, and thus within the three years limited by section 394 of the Code of Civil Procedure. This would also be so if we assume within the cases cited that the penalty was incurred when the bonds were first issued, or during any of the ten years which they had to run, and the cause of action to recover it remained dormant until the bonds became due.

The defendant Hedstrom was elected trustee in June, 1895, and his default in filing the report occurred in January, 1896, and his liability to the penalty then attached because the debt was "then existing." (*Boughton v. Otis*, 21 N. Y. 261; *Vincent v. Sands*, 42 How. Pr. 231; affirmed, 58 N. Y. 673.)

The complaint charges all the defendants with liability because of the default in filing the report in 1896. The answer alleges the default of the defendants Holden in 1893, and thereupon alleges a misjoinder of a cause of action against themselves, with a separate cause of action against the defendant Hedstrom whose default did not occur until 1896. This, however, is not an allegation that all the defendants were not liable when the action was commenced, but that their liability accrued at different dates. The statute makes every director jointly and severally liable for the penalty incurred by the default of the board of which he is a member, in filing the report. The liability is for debts "then existing" — that is, whether due or not. Cumulative penalties are not favored, unless expressly declared; besides, the penalty does not exceed the debt, and one is, therefore, enough. Therefore, successive defaults by the same directors do not renew as to them the penalty already incurred, but when a new member comes into the board a new default makes him jointly and severally liable for the debts "then existing" — that is, he becomes jointly liable with the old members of the new defaulting board. As they were already liable because of their previous default, the new member is jointly associated with them in that liability, so long as their several liability is concurrent. This is enough

for the creditor's purposes if he bring his action against them all before the Statute of Limitations bars that liability, as in the case before us.

The plaintiff purchased his ten bonds in January, 1884, of Eric L. Hedstrom, then the owner thereof, and then and until his death in October, 1894, a director and the president of the company. As such director he was in default in filing the report at the time of his sale of the bonds to the plaintiff, and he could not enforce the penalty against his co-directors. (*Knox v. Baldwin*, 80 N. Y. 610.) The defendants Holden urge that the plaintiff stands in his shoes and cannot recover against them. The plaintiff succeeded to the title of Eric L. Hedstrom to the bonds, but not to the penalties and disabilities consequent upon his personal nonfeasance as a director of the corporation. That nonfeasance did not affect the salable quality of the bonds themselves (*Cornell v. Roach*, 101 N. Y. 373), nor deprive the plaintiff in his character as creditor of the corporation of the remedy which the statute gave him.

No doubt the parties in drawing their pleadings felt some uncertainty under the cases as to the year in which the directors, other than the defendant Hedstrom, incurred the penalty. A mistake of date due to a mistake as to the date the law fixes, is not reversible error, if within the true dates the plaintiff has shown his right to recover. We venture to solve the uncertainty thus:

While the director, Eric L. Hedstrom, held these bonds, his co-directors incurred no penalty in his favor as to them. They incurred none in favor of the plaintiff until after he by the purchase of the bonds became a creditor of the corporation. Then he had an "existing debt" against it. The statute affixes the penalty as to existing debts "at the time" the default in filing the report becomes complete, thus excluding any other time. The plaintiff bought the bonds in January, 1884, and, therefore, the directors first thereafter making default in filing the report incurred the penalty as to the plaintiff. The defendants Holden were then directors. If the plaintiffs bought the bonds before January 21st of that

year, the penalty was incurred upon the close of that day ; if after that date, then in January, 1885. If these views are correct, then the date at which the penalty was incurred by the Holdens removes it from attack through Eric L. Hedstrom's default.

The judgment and order should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, HAIGHT, VANN and CULLEN, JJ., concur ; BARTLETT, J., dissents.

Judgment and order affirmed.

DAVID BOYD, Individually, and as Administrator of SAMUEL BOYD, Deceased, Appellant, v. ROBERT BOYD et al., Respondents.

WITNESS — ADMISSIBILITY OF EVIDENCE TENDING TO CONTRADICT OR IMPEACH. Where a witness upon an issue whether an assignment to his nominee of a sheriff's certificate of redemption is a forgery, testifies that he furnished the money to the assignor to make the redemption, and subsequently paid the judgment upon which he redeemed, evidence that theretofore, in proceedings supplementary to execution against him, he had testified that the property in question was not held in trust for him, and that he did not know the assignor, is admissible to contradict or impeach his testimony at the trial, since, if true, it furnished a reasonable basis for the inference that the assignment was genuine.

*Boyd v. Boyd*, 21 App. Div. 361, reversed.

(Argued May 14, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered October 20, 1897, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the Court of Common Pleas for the city and county of New York, on trial at an Equity Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Edward W. S. Johnston* for appellant. The court erred in receiving the testimony of the defendants Elise Boyd and Joseph J. Carberry. The testimony that was given by them



was within the inhibition of section 829 of the Code of Civil Procedure. The objection was properly raised, and the error in receiving the testimony was in no respect cured on the trial. (*Benner v. A. D. Co.*, 134 N. Y. 159; *S. S. G. Co. v. Potthast*, 80 N. W. Rep. 517; *Morgenthau v. Walker*, 2 Misc. Rep. 246; *Becker v. M. R. Co.*, 87 Hun, 317; *Alexander v. Davis*, 42 W. Va. 465; *Chaffee v. Goddard*, 42 Hun, 147; *Howell v. Manwaring*, 3 N. Y. S. R. 455; *Garvey v. Owens*, 37 Hun, 498; *Boughton v. Bogardus*, 35 Hun, 198; *Matter of Weeks*, 23 App. Div. 151.) The court erred in receiving the testimony of Robert Boyd over the objection and exception of the plaintiff that it was within the inhibition of section 829 of the Code. (*Mills v. Kernochan*, 3 N. Y. S. R. 152; *Williams v. Davis*, 7 Civ. Pro. Rep. 283; *Viall v. Leavens*, 39 Hun, 291; *Stuart v. Patterson*, 37 Hun, 113; *Heyne v. Doerfler*, 124 N. Y. 505; *Hill v. Heermans*, 17 Hun, 470.) The court improperly rejected proof of the execution by Robert Boyd of plaintiff's Exhibit 6 (an alleged assignment of a certificate of redemption) for identification, and of the handwriting of Robert Boyd therein, and improperly refused to admit plaintiff's Exhibit 6 for identification in evidence, together with evidence of a comparison by competent witnesses of that proved handwriting of Robert Boyd and the handwriting in the signature of the disputed paper. (*Beach v. City of Elmira*, 34 N. Y. S. R. 523; *Bell v. Merrifield*, 109 N. Y. 203; *Blair v. Bartlett*, 75 N. Y. 150; *Bruen v. Hone*, 2 Barb. 587; *C. P. P. & Mfg. Co. v. Walker*, 114 N. Y. 7; *W. G. L. Co. v. Y. G. L. Co.*, 14 Wkly. Dig. 95; *Shearer v. Field*, 6 Misc. Rep. 189; *Hudcock v. O'Rourke*, 17 N. Y. S. R. 894; *Patrick v. Shaffer*, 94 N. Y. 423; *Taylor v. Taylor*, 63 Hun, 303.) The trial court erred in rejecting the offer of the plaintiff to prove that the defendant Robert Boyd had forged the signature of Samuel Boyd to this plaintiff's Exhibit 6 for identification, and that that forged paper was one of three papers which Robert Boyd had ordered his attorney to prepare, which he had handed back to the attorney as having been executed by Samuel Boyd,

and all of which papers purport to bear the same date, and to have the same handwriting of Robert Boyd as to the filling in of the date thereof, and purport to be witnessed by the same subscribing witness and proved by that subscribing witness before the same notary public, and which three papers included this document forged by Robert Boyd, and the paper in dispute in this action, along with a third, and that Robert Boyd had admitted that this Exhibit 6 for identification so proved to have been forged by Robert Boyd was not signed by Samuel Boyd, and that such forged signature bore the same indicia, and was stroke for stroke, line for line, and dot for dot the same as the alleged signature to the disputed paper herein. (*People v. Everhardt*, 104 N. Y. 59; *People v. Lyon*, 1 N. Y. Cr. Rep. 401; *Burks v. State*, 6 S. W. Rep. 302; *Fay v. Lynch*, 17 Wkly. Dig. 349; *Rex v. Voke*, R. & R. 531; *Reg. v. Proud*, L. & C. C. C. 97; *Reg. v. Richardson*, 2 F. & F. 343; *Commonwealth v. Tuckerman*, 10 Gray, 173; *Commonwealth v. Shepard*, 1 Allen, 575; *Commonwealth v. Eastman*, 1 Cush. 189.)

*Henry Daily, Jr.*, for respondents. There was no error in the reception or rejection of evidence. (*Moore v. N. Y. E. R. R. Co.*, 126 N. Y. 671; *Springer v. Bien*, 128 N. Y. 99; *Stokes v. Stokes*, 155 N. Y. 591; *Shaw v. Broadbent*, 129 N. Y. 114; *Weed v. Burt*, 78 N. Y. 191; *Webb v. Buckelew*, 82 N. Y. 555; *People v. Johnson*, 38 N. Y. 63; *Campbell v. Consalus*, 25 N. Y. 613; *Cauhape v. Parke Davis & Co.*, 121 N. Y. 152; *House v. Lockwood*, 137 N. Y. 259.) None of the testimony received was within the inhibition of section 829 of the Code of Civil Procedure. (*Pinney v. Orth*, 88 N. Y. 447; *Lewis v. Merritt*, 98 N. Y. 206; *Wadsworth v. Heermans*, 85 N. Y. 639; *Nay v. Curley*, 113 N. Y. 575; *Heir v. Grant*, 47 N. Y. 278; *Hard v. Ashley*, 117 N. Y. 606; *Nearpass v. Gilman*, 104 N. Y. 506; *Simmons v. Havens*, 101 N. Y. 427; *Ten Eyck v. Craig*, 62 N. Y. 406.)

O'BRIEN, J. This action was brought under section 1473 of the Code by the plaintiff, in his capacity as adminis-

trator and sole heir at law of a deceased person, who, it is alleged, was, at the time of his death, entitled to a sheriff's deed of certain real estate described in the complaint, and which had been sold by the sheriff on execution and redeemed by the deceased as a junior judgment creditor. The relief prayed for is that the sheriff, who was made a party defendant, be adjudged to execute a deed to the plaintiff of the lands, and that a certain paper purporting to be an assignment of the certificate of redemption by the deceased in his lifetime, which it is alleged is a false and forged paper, be adjudged to be null and void, and that a deed to the person named as assignee in the false paper, and by him to the other defendants, be declared fraudulent and void.

The controversy arises upon the following facts: On March 5th, 1872, a judgment was recovered against the defendant Robert Boyd and another, at the suit of the People, as sureties upon a forfeited bail bond. The premises described in the complaint were sold upon execution issued on this judgment January 11, 1873, the defendant Boyd then having the title. The sheriff issued a certificate to the purchaser, which was duly recorded.

On the 9th of April, 1874, the premises sold were redeemed by Samuel Boyd, the deceased, as a judgment creditor of Robert Boyd, the owner, upon a judgment duly entered April 4th, 1874, by payment of the purchaser's bid and interest. The usual certificate of redemption was delivered to the deceased by the sheriff, and thereupon he became entitled to a deed of the lands so redeemed, but died on the 16th of April, 1883, intestate, without having received any deed.

The plaintiff alleges in his complaint that on April 2d, 1883, the defendants Robert Boyd and Elise Boyd, his wife, and Joseph J. Carberry, conspiring together with intent to cheat and defraud the deceased, Samuel Boyd, who then held the certificate of redemption, and his heirs and legal representatives, of all their right, title and interest in and to said premises so redeemed, and to a conveyance thereof from the sheriff, made or caused to be made, and did produce and utter as true,

a false, forged, fabricated and fraudulent paper writing, purporting to be an assignment of said certificate of redemption from said Samuel Boyd to the defendant Elise Boyd, wife of Robert Boyd; that this paper writing purported to have been executed by the deceased and witnessed by the defendant Carberry as a subscribing witness, in fact was never so executed and was in fact a forgery; that in pursuance of said conspiracy and with the same fraudulent intent, the defendants Robert Boyd and wife and Carberry did, on the 26th of January, 1885, present this false writing, purporting to be an assignment of the certificate of redemption, to the sheriff and caused him to execute and deliver to said Elise Boyd, as assignee of the certificate, a conveyance of the lands so redeemed which, with the false writing above mentioned, was recorded in the clerk's office of the county.

It is further alleged in the complaint that the defendants, with the same fraudulent intent and purpose, caused the defendant Elise to convey the lands to the defendant Carberry on September 7th, 1885, by deed recorded December 3d, 1885, and that with a like purpose and intent the latter conveyed to the defendant Robert Boyd by deed dated September 14th, 1885, and recorded December 3d, 1885. The latter was in possession of the premises at the time of the commencement of this action.

It is quite apparent that the controversy turned upon the character of the paper which purported to be an assignment by the deceased to Elise, the wife of Robert Boyd, of the certificate of redemption. If that was a genuine paper the sheriff had already conveyed the premises to the party holding the certificate of redemption, and the plaintiff had no case. If, on the contrary, it was a false paper, never in fact executed by the deceased, neither that nor the conveyance based upon it constituted any obstacle to the plaintiff's right as administrator and heir at law of the deceased. The issue between the parties was, therefore, one of fact concerning the true nature of the instrument which purported to transfer to Elise all the rights of deceased under the certificate of redemption.

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The trial court determined this issue in favor of the defendants and dismissed the complaint, and the judgment has been affirmed on appeal.

There was evidence before the trial judge tending to show that this was a false paper, but clearly it was not so strong or conclusive as to require him to find and decide that it was. The finding at the trial in favor of the defendants on the facts is conclusive on this court, and there is nothing before us but the questions of law raised during the trial by exceptions. In a case of this character we ought not to interfere with the judgment below for rulings at the trial which, though technically wrong, were immaterial and could not, in any fair view of the case, have prejudiced the defeated party. But the exceptions appearing in this record raise important questions of law which must have affected the whole course of the trial, and, as decided by the learned trial judge, must have operated to the prejudice of the plaintiff. This will plainly appear when we refer to some of the rulings and have pointed out their bearing upon the merits of the case.

1. The plaintiff's counsel produced a paper purporting to be an assignment by the deceased of another certificate of redemption of other lands of Robert Boyd, sold upon execution and redeemed by the deceased as a judgment creditor. This paper is dated the same day as the one in question in this action, is attested by the same subscribing witness and proved in the same manner. The record contains photographic copies of both papers. It is evident that they were drafted by the same person, and the signature of the deceased to each is apparently in the same handwriting, and they differ in appearance only in the fact that the one so produced is left in blank for the name of the assignee to be inserted. The counsel also produced a judgment record of an action in the Superior Court of the city of New York, in which the defendant Robert Boyd was plaintiff and the plaintiff in this action was the defendant in his individual and representative capacity. It appeared from the pleadings that Robert claimed the benefit of the assignment in blank of the certificate, and that he was

virtually, under the assignment, entitled to the lands described in the same and to the deed of the same, while the defendant in his answer insisted, as he insists in this case, that the deceased had never made any assignment of the certificate of redemption, and that the right to the deed was in him as the personal representative and heir at law of the deceased. It appeared from the findings of the court in the case that it was decided in the action that the deceased never signed or executed the paper, and that the signature purporting to be his was not genuine. The counsel offered the paper and the judgment record in evidence, but both were excluded upon the objection of the defendants, to which ruling an exception was taken. The learned counsel for defendants attempted to justify this ruling upon the ground that the paper and the judgment roll in the former action related to another parcel of land redeemed by the deceased, and had no relation to the land in question. But the fact that the papers related to different parcels of land was wholly immaterial, since the competency of the proof offered did not depend upon the identity of the property described in the two papers, but upon other considerations. The proof, if admitted, would show or tend to show that a transaction precisely similar to that which is called in question in this action between the same parties, or some of them, was tainted with the same vice which is alleged against the transaction involved in this action. It tended to prove that the defendants at least attempted, by means of false papers, made at the same time and in the same way, to transfer to themselves another portion of the estate of the deceased which the plaintiff represents. It is argued by the learned counsel for the plaintiff that the transaction excluded by the rulings of the court was proof of the conspiracy charged in the case at bar, and that the paper offered, purporting to have been executed by the deceased, was a proper standard by which to determine, under the statute, the genuineness of the signature to the paper which is the foundation of the defendants' title in this case.

It may be that the proof offered was admissible on one or

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more of the grounds thus urged, but we do not think it necessary to consider that feature of the argument, since we are of opinion that the question may be viewed in a broader light and determined by a safer and more simple rule.

The paper purporting to be an assignment of another certificate of redemption held by the deceased, when taken with the judgment record, tended to prove a contemporaneous fraud by the same parties upon the same estate, similar in all respects to the one which the plaintiff has assailed in this action. It was none the less a fraud upon the deceased and upon the plaintiff, because it also involved forgery, or the making and uttering of a false paper. In all cases where it is alleged that a party has acquired the property of another through some fraudulent device, the charge may be supported by proof of contemporaneous acts of the same character. (*Benham v. Cary*, 11 Wend. 83; *Jackson v. Timmerman*, 12 Wend. 299; *Cary v. Hotailing*, 1 Hill, 311; *Hall v. Naylor*, 18 N. Y. 588; *Miller v. Barber*, 66 N. Y. 558; *Mayer v. People*, 80 N. Y. 364; *Van Kleek v. Leroy*, 4 Abb. [N. S.] 431.) The paper offered was delivered to the defendant Robert, and in the subsequent suit he asserted title to the property described in it against the present plaintiff. If the plaintiff in the present action could show that the defendants acquired, or attempted to acquire, title to other portions of the property of the deceased by means similar to that charged in the complaint, the proof was competent. Of course it was not conclusive, but it was admissible. The paper itself, when supplemented by the judgment record, did tend to prove that fact. The record of the present case, now before us, does not contain the former judgment in full. It does contain the pleadings and the findings of the court so far as they relate to the character of the paper which was involved in that action, and enough appears to show that the proof offered was improperly excluded. The record was not pleaded or offered as a former adjudication between the parties of any issue involved in this case, but simply as evidence of a material fact, and as such it was admissible.

The grounds upon which evidence of this character is admitted have not always been stated by courts in the same language, but I think there is neither reason nor authority to support the proposition that it must always be limited to cases where motive is material. But, even if that were so, it cannot be said that intention or motive was immaterial in this case. The plaintiff had the right to show if he could a fraudulent intent, purpose or motive on the part of the defendant to make and utter the spurious paper, since that had some bearing on the question whether in fact he actually made it. Proof of other and similar fraudulent acts is admissible when it appears that there is such a connection between the transactions as to authorize the inference that both frauds are part of one general scheme, and where transactions of a similar character by the same party are closely connected in point of time, and otherwise, the inference is reasonable that their purpose and origin are the same. The reason for receiving evidence of this character was very clearly stated in a recent case as follows: "Acts which are part of one general scheme or plan of fraud, designed and put in execution by the same person, are admissible to prove that an act which has been done by some one was in fact done by the person who designed and pursued the plan, if the act in question is a necessary part of the plan." (*Fowle v. Child*, 164 Mass. 213; *N. Y. M. L. Ins. Co. v. Armstrong*, 117 U. S. 591; *Jordan v. Osgood*, 109 Mass. 457.)

2. Robert Boyd was sworn as a witness in his own behalf, and was asked who furnished the money to the deceased which was paid to redeem from the sheriff's sale. The witness was permitted, against the plaintiff's objection and exception to the competency of the inquiry, to answer that he furnished the money himself, though he was the defendant in the judgment under which the redemption was made. The witness was also permitted to testify that he never signed the name of the deceased to the disputed paper, although the question was objected to by plaintiff's counsel as within the inhibition of section 829 of the Code, which objection was overruled by the



court and the plaintiff's counsel excepted. He was also asked if he had not paid the judgment under which the deceased redeemed before his death, and, against the plaintiff's objection that the question was incompetent, he was permitted to answer that he had. When it appeared from the cross-examination of the witness that these transactions were with the deceased, the plaintiff's counsel moved to strike out the answer as within the prohibition of section 829 of the Code. The motion was denied and the plaintiff's counsel excepted. This ruling was error. The witness was the principal defendant in the action, deriving his claim of title from the deceased under the disputed assignment of the certificate of redemption. He was permitted to testify to what was clearly a personal transaction with the deceased against the plaintiff, who was his personal representative and heir at law. (*Grey v. Grey*, 47 N. Y. 552.) Inasmuch as this testimony tended to show that the deceased was never the beneficial holder of the certificate, and that the witness at all times was, the deceased being simply a trustee for his benefit, the answers were quite material.

The statute excludes all testimony on the part of a surviving or interested party "concerning a personal transaction" with the deceased. This prohibition cannot be evaded by any indirection, as by offering testimony of some negative fact. When it appears that there was a personal transaction and that the testimony offered tends to show either what did take place between the parties or what did not, it must be excluded by force of the statute so long as it concerns the transaction or justifies an inference as to what it really was. The statute may be as effectually violated by testimony of a negative character as by affirmative proof of what actually took place. The testimony of Robert that he never signed the name of the deceased to the paper in controversy illustrates the manner in which a prohibitive statute may be evaded by the ingenuity of counsel. Of course, if the plaintiff's theory of the case be the true one, then there never was any personal transaction with the deceased, since it is alleged that the deceased never executed or delivered the paper and that it is a spurious

instrument. But on the other hand the defendants insist that it is the genuine act of the deceased and that he signed and delivered it at the date specified. Hence, upon the defendants' theory there was a personal transaction, which consisted in the execution and delivery to the wife of the witness, under whom he claimed title, of a written assignment of the certificate of redemption. The witness gave testimony to prove that transaction. If it did not prove or tend to prove it, then it was not admissible at all. But when he swore that he never signed the paper his testimony tended to prove that the deceased did, since there was no claim that any one else had anything to do with the transaction. His testimony, under the circumstances, had nearly the same probative value as if he had sworn, as the other witnesses did, that he was actually present at the time and saw the deceased affix his signature to the instrument. The testimony, therefore, was concerning a personal transaction with the deceased, since it was an attempt to prove it by negative instead of affirmative testimony. If the witness was not competent to prove what took place at that transaction by direct or affirmative testimony he was not competent to prove it by indirect or negative testimony. (*Clift v. Moses, infra*; *Walsh v. McArdle*, 78 Hun, 411.) His wife swore, and it was admitted, that he was present when the paper was signed by the deceased as a genuine instrument. Hence, if it be true that such a transaction ever took place, the witness participated in it and could not testify concerning it either affirmatively or negatively.

The defendant Elise Boyd, wife of the defendant Robert Boyd, was sworn generally as a witness for the defendants, and the defendant Carberry was a witness in his own behalf. Both testified that they were present and saw the deceased sign the disputed paper. The question which elicited these answers was, in each case, objected to as within the inhibition of section 829 of the Code; but the objection was overruled and the plaintiff's counsel excepted. This testimony should have been excluded. They were not only defendants in the action, but parties under or through whom the defendant

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Robert Boyd claimed title, and they testified against the plaintiff, the administrator, to what was clearly a personal transaction with the deceased. Elise was the person to whom the disputed assignment was made, and she is named as the assignee in the paper. Carberry was the subscribing witness, and both were present when they claimed the deceased executed the instrument. They testified to a transaction which the deceased, had he been alive, could have denied or qualified. It was, therefore, a personal transaction, within the meaning of the Code. (*Holcomb v. Holcomb*, 95 N. Y. 316; *Clift v. Moses*, 112 N. Y. 426; *In re Eysaman*, 113 N. Y. 62; *Adams v. Morrison*, Id. 152; *In re Dunham*, 121 N. Y. 575; *Devlin v. Greenwich Sav. Bank*, 125 N. Y. 756; *Petrie v. Petrie*, 126 N. Y. 683; *In re Bernsee*, 141 N. Y. 392; *Martin v. Hillen*, 142 N. Y. 140; *In re Callister*, 153 N. Y. 294.) The testimony was clearly forbidden by the statute, and after it was admitted there was no distinct ruling that cured the error within the principle sanctioned by this court. (*Blashfield v. Empire State Telephone & T. Co.*, 147 N. Y. 520.)

The testimony of the three defendants did not come within the exception recognized in *Pinney v. Orth* (88 N. Y. 447), and the cases which follow it. The rule laid down in that case precludes the surviving party to a personal transaction with a deceased person from testifying to what passed between them personally, or did not pass, as against the personal representative of the deceased, but does not preclude the survivor from testifying to extraneous facts or circumstances which tend to show that a witness who has testified affirmatively to such a transaction has testified falsely, or that it is impossible that his statement can be true, as, for instance, that the survivor was at the time of the alleged transaction absent from the country and, therefore, that the interview could not have occurred. In this case the three surviving parties to the transaction were allowed to testify to what did or did not take place, and if their testimony was accepted it was nearly conclusive upon the court on the issue whether the paper was genuine or spurious. I have not overlooked the circumstance

that at a subsequent stage of the trial the learned trial judge stated that, of his own motion, he had stricken out all the testimony of these two witnesses with respect to the actual execution of the paper, although the testimony of Robert, which has been referred to, was not included in the statement. But as soon as that statement was made the defendants' counsel recalled both of them and proceeded to prove under like objection and exception that the signature to the paper was the genuine signature of the deceased from their knowledge of the handwriting. After having sworn that they were present and saw the deceased sign the paper the inquiry as to *their opinions* based upon knowledge of handwriting would seem to be quite perfunctory. When a witness has testified to a fact from personal knowledge and observation it must be expected that he will testify to the same fact as matter of opinion. The witnesses were so committed that it was possible for them to express but one opinion on the subject, if, indeed, it could be called an opinion at all, in any legal sense. The process of separating what a witness swears to from personal knowledge and observation, from what he subsequently asserts in the same direction as matter of opinion, is too subtle and unsafe to be used by either the jury or the court in determining the weight and value of evidence. It is very clear that the learned judge gave considerable weight to the testimony of these two witnesses, and it is quite difficult to say that he rejected what they stated as matter of personal knowledge and adopted what they asserted as mere matter of opinion, or that the witnesses themselves observed any such refined distinction.

3. It will be remembered that the defendant Robert Boyd was permitted to testify that he furnished the money to the deceased to make the redemption, and subsequently paid the judgment upon which he redeemed. This testimony tended to show that the deceased held the title and the certificate as trustee for Robert. If true, it furnished a reasonable basis for the inference that the assignment was genuine, since it was the duty of the deceased to transfer the property to the real

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beneficiary. The plaintiff had the right to contradict the testimony of Robert in that regard, since the court evidently regarded it, as in fact it was, very material. The plaintiff's counsel produced the written examination of Robert taken in proceedings supplementary to execution, filed in September, 1883, and offered to show by it that he then declared that none of the property sold on execution was held in trust for him and that he did not know the deceased. The testimony offered was excluded and plaintiff's counsel excepted. We think it was admissible, since it contained the admissions or declarations of the witness tending to contradict or impeach his testimony at the trial, to the effect that he furnished the money for which the certificate was issued and paid the judgment. In other words, if his testimony in that regard contained in the written examination was true, there was no secret trust for his benefit, represented by the certificate in the hands of the deceased.

There are some other exceptions in the case that might be difficult to answer, but since they may be obviated upon another trial it is unnecessary to consider them. It may be quite true, as intimated by the court below, that the charge stated in the complaint is unjust to the defendants and has its origin in improper motives; but if that be so we cannot believe that the rights of the parties will suffer from a full investigation conducted according to the established rules of evidence for the ascertainment of truth.

The judgment of the Appellate Division and of the Special Term should be reversed and a new trial granted, costs to abide the event.

HAIGHT, MARTIN and LANDON, JJ., concur upon the third ground stated in the opinion; WERNER, J., concurs in the result; GRAY, J., dissents; PARKER, Ch. J., not sitting.

Judgment reversed, etc.

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168	580

ISIDORE NEUMAN, Respondent, v. THE NEW YORK MUTUAL SAVINGS AND LOAN ASSOCIATION, Appellant.

APPEAL—PRESUMPTION OF REVERSAL UPON QUESTIONS OF LAW—CODE OF CIV. PRO. § 1388. An order of the Appellate Division reversing a judgment of the Special Term and granting a new trial which does not state that the reversal was upon the facts, must be presumed to have been made on questions of law; and where the record discloses no errors in the reception or rejection of evidence, or in material findings of fact unsupported by any evidence, or in conclusions of law not sustained by the facts found, it must be reversed, and the judgment of the Special Term affirmed.

*Neuman v. N. Y. Mut. Sav. Assn.*, 17 App. Div. 72, reversed.

(Argued June 15, 1900; decided October 2, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 16, 1897, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Frank E. Smith* and *T. F. Conway* for appellant. The order appealed from must be conclusively deemed to have been based upon errors of law, and this court will adopt the facts found by the trial court, and, if necessary to support the judgment entered upon its decision, deem such other facts found by him as the evidence would have warranted. (*Ogden v. Alexander*, 140 N. Y. 356; *Groves v. Rice*, 148 N. Y. 232; *F. N. Bank v. Chalmers*, 144 N. Y. 436; *Clark v. Howard*, 150 N. Y. 239; Code Civ. Pro. §§ 1337, 1338.)

*H. C. Sholes* for respondent. The claim of the defendant that this court must deem such facts found by the trial court as would support its finding that there was no fraud on the part of the defendant, is not tenable. (*Morris v. Talcott*, 96 N. Y. 100; 14 Am. & Eng. Ency. of Law [2d ed.], 206; *Sturtevant v. Ballard*, 9 Johns. 336; *Porter v. Ruckman*, 38 N. Y.

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210; *Draper v. Stouvenel*, 38 N. Y. 219; *Fellows v. Northrup*, 39 N. Y. 117; *Putnam v. Hubbell*, 42 N. Y. 107; *Todd v. Nelson*, 109 N. Y. 316; *Bradley v. McLaughlin*, 8 Hun, 545; *Burger v. Baker*, 4 Abb. Pr. 11.)

BARTLETT, J. The plaintiff, on the first day of May, 1891, borrowed of the defendant, a building and loan association, the sum of \$2,600.00, giving his bond for the amount, with annual interest at six per cent, secured by mortgage on real estate in the city of Utica. On or about the 29th day of March, 1894, the plaintiff duly tendered to the defendant the sum of \$2,080.00 and demanded the cancellation and satisfaction of the bond and mortgage. The sum so tendered represented the amount then claimed to be due after charging plaintiff with the mortgage debt and interest and crediting him with all payments made defendant under the provisions of the mortgage. The tender was refused, and plaintiff began this action alleging that the bond and mortgage were obtained by false and fraudulent representations, and by concealment as to the contents thereof, and praying that on payment of the sum tendered the same be adjudged null and void, and that the mortgage be canceled and discharged of record.

The trial court found, among other things, that for the purpose of inducing plaintiff to execute and deliver the bond and mortgage, the defendant represented to plaintiff that he would have only \$2,400.00 to pay of principal, interest would be only three and one-half to four per cent, and that he would have to pay on the mortgage only from six and one-half to seven years, because the defendant had made from fifteen to twenty per cent every year; that plaintiff subscribed for twenty-six shares of the defendant's stock as required in order to procure the loan; that in the year 1891 the defendant's receipts were \$8,662.84; expenses, \$5,444.51, leaving a balance over expenses of \$3,218.33; that plaintiff paid to defendant prior to March 29th, 1894, the date of his tender, \$998.40; that the defendant claimed that instead of the amount tendered there was due on the bond and mortgage at that time the sum of \$2,409.14; that there was no fraud on the part of

the defendant in negotiating the loan, which entitled the plaintiff to the relief for which he prayed.

The conclusion of law followed that the complaint be dismissed, with costs. The trial judge handed down an opinion in which he stated, in substance, that the representations as to past earnings were made by the defendant, and the evidence showed them to be true.

In this connection the language of the opinion is: "Upon all the evidence on the subject of fraud I do not see how I can find there was fraud on the part of the defendant, or its agent Donohue, in negotiating this loan, which entitles the plaintiff to have this bond and mortgage canceled and discharged of record on paying the amount tendered."

The Appellate Division reversed the judgment of the Special Term and ordered a new trial. The order of reversal does not state it was made on the facts, and we must assume it was on questions of law. (Code of Civil Procedure, § 1338.)

When the appeal was first called in this court the counsel for the plaintiff and respondent was admonished that it was unsafe for him to proceed with the argument in the existing state of the record. An adjournment was granted to afford counsel for the respondent an opportunity to move the Appellate Division to amend its order so as to state that the reversal was on the facts as well as the law, and an intimation was given that in the event of the granting of the motion the appellant would be allowed to withdraw his appeal.

After a considerable interval this appeal was again moved, and as counsel for plaintiff and respondent has failed to amend his order, it remains for us to render our decision on the record as it stands.

This court has very recently decided that where a judgment is not reversed upon a question of fact, but on the law, three questions only can be considered: Error in receiving or rejecting evidence; whether the conclusions of law are supported by the facts found; whether any material finding of fact was without evidence to support it. (*National Harrow Co. v. E. Bement & Sons*, 163 N. Y. 505.)



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There are no questions on the reception or rejection of evidence requiring attention, and the Appellate Division, in order to reverse, must have found error of law in material findings of fact unsupported by any evidence, or conclusions of law not sustained by the facts found. The record discloses no errors of law in these particulars.

The finding of fact that the receipts of the defendant were \$3,218.33 in excess of expenses, rests upon sharply conflicting evidence. The plaintiff's expert differed with the defendant's expert as to the manner in which the annual accounts, which involved complicated figures, should be made up in order to ascertain whether there had been a profit or loss in the business. The difference of opinion was mainly upon the aggregate amount representing the sum charged shareholders not exceeding a dollar per share per annum. The plaintiff's expert swore this item of assessment could not be properly regarded as part of the receipts of the defendant, and the defendant's expert took the contrary view.

The trial court stated the account according to the evidence of defendant's expert, thereby establishing the truth of defendant's representations as to former earnings.

This view of the evidence and stating of the account also justified the finding of no fraud on the part of the defendant. These findings of fact support the conclusions of law that the plaintiff is not entitled to maintain this action and that the complaint must be dismissed.

This plaintiff, who can neither read nor write, seems to have entered into a contract, not only complicated in its terms, but very unfavorable to the borrower of money.

It is to be regretted that the state of the record, which shows a case of great hardship, precludes the plaintiff from securing any relief.

The order of the Appellate Division should be reversed and the judgment of the Special Term affirmed, without costs to either party in this court.

PARKER, Ch. J., O'BRIEN, HAIGHT, VANN, LANDON and CULLEN, JJ., concur.

Order reversed, etc.

THE CHEMUNG CANAL BANK, Respondent, v. BENJAMIN N.  
PAYNE et al., Defendants.

HARRIET LAND et al., Appellants.

**MORTGAGE COVERING REAL AND PERSONAL ESTATE — EFFECT OF DELAY IN FILING AS CHATTEL MORTGAGE ON ITS VALIDITY AS REAL ESTATE MORTGAGE.** The technical or statutory invalidity as a chattel mortgage as against creditors of the mortgagor, of a mortgage covering both real and personal estate due to the delay in filing it as a chattel mortgage, does not affect its validity as a real estate mortgage, where there was no actual fraud attaching to the mortgage in either branch of it, but it was given in good faith for an honest and ample consideration and with no intent to injure, delay or defraud other creditors of the mortgagor.

*Chemung Canal Bank v. Payne*, 22 App. Div. 353, affirmed.

(Argued June 21, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 15, 1897, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

*E. J. Baldwin* for Harriet Land et al., appellants. The mortgage foreclosed in this action was fraudulent and void because there was no actual and continued change of possession and the mortgage was not filed. (2 R. S. 136, § 5; L. 1833, ch. 279, § 1; Thomas on Chat. Mort. 222, § 325; *Karst v. Gane*, 136 N. Y. 316; *L. I. & S. Co. v. Payne*, 13 App. Div. 11.) The mortgage sought to be foreclosed was and is fraudulent and void as against these appellants who were creditors of said firm of B. W. Payne & Sons, because it was executed and delivered with intent to hinder, delay and defraud creditors including these appellants. (2 R. S. 137, § 1; *Bonnell v. Griswold*, 89 N. Y. 122; *Redfield v. Redfield*, 110 N. Y. 673; *Israel v. M. Ry. Co.*, 158 N. Y. 623; *Parsons v. Parker*, 159 N. Y. 16; *Potts v. Hart*, 99 N. Y. 172; *Gris-*

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Points of counsel.

*wold v. Sheldon*, 4 N. Y. 580; *Dodd v. Johnson*, 3 T. & C. 215; *Edgell v. Hart*, 9 N. Y. 216; *Reynolds v. Ellis*, 103 N. Y. 124; *Stoddard v. Benner*, 72 N. Y. 424.) The mortgage which is the subject of this action, if void in part, because executed, delivered and received with fraudulent intent, would be void *in toto*. (*Mackie v. Cairns*, 5 Cow. 547; *Hyslop v. Clarke*, 14 Johns. 458; *Grover v. Wakeman*, 11 Wend. 189; *Mittnacht v. Kelly*, 3 Keyes, 407; *Matter of Burrows*, 5 Wkly. Dig. 137; *Curtiss v. Leavitt*, 15 N. Y. 123; *Russell v. Winne*, 37 N. Y. 591; *Dodd v. Johnson*, 3 T. & C. 215; *Weed v. Haroes*, 10 Conn. 54; 3 Wait's Act. & Def. 470; *Roberts v. Vietor*, 130 N. Y. 585.) There is no distinction to be made in this case between fraud in fact and fraud in law. (*Cunningham v. Freeborn*, 11 Wend. 241; *O. L. & Co. Bank v. Tallcott*, 19 N. Y. 146; *Southard v. Benner*, 72 N. Y. 424; *Coleman v. Burr*, 93 N. Y. 17.)

*F. B. Gill* for Syracuse Tube Company appellant. The mortgage in question was executed by the mortgagors and received by the mortgagee with the fraudulent intent in the mind of each of them to hinder, delay and defraud the creditors of the mortgagors. This fraudulent intent extended to the personal property conveyed by the mortgage and tainted the whole transaction, making the maxim "void in part void *in toto*," applicable. (*Collomb v. Caldwell*, 16 N. Y. 484; Abb. Tr. Ev. 738; *City Bank of Rochester v. Westbury*, 16 Hun, 458; Thomas on Chat. Mort. § 263; *Cook v. Bennett*, 60 Hun, 8; *Griswold v. Sheldon*, 4 N. Y. 581; *Southard v. Benner*, 72 N. Y. 424; *Potts v. Hart*, 99 N. Y. 168; *Ford v. Williams*, 24 N. Y. 359; *Brackett v. Harvey*, 91 N. Y. 214; *Mandeville v. Avery*, 124 N. Y. 376; *Edgell v. Hart*, 9 N. Y. 213.)

*Frederick Collin* for respondent. Appellants' contention that the mortgage foreclosed in this action was fraudulent and void because there was no actual and continued change of possession, and the mortgage was not filed, is not tenable. (*Karst v.*

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*Gane*, 136 N. Y. 305; *Preston v. Southwick*, 115 N. Y. 140; *Stephens v. Perrine*, 143 N. Y. 476; 2 R. S. [9th ed.] 1887, §§ 1, 4; *Kain v. Larkin*, 131 N. Y. 300; *Davis v. Schwartz*, 155 U. S. 631, 645; *Roberts & Co. v. Buckley*, 145 N. Y. 215; *Tremain v. Mortimer*, 128 N. Y. 1; *Sayre v. Hughes*, 32 N. J. Eq. 652; *N. C. Nat. Bank v. Lord*, 33 Hun, 557; *Southard v. Benner*, 72 N. Y. 424.) Appellants' contention that the mortgage sought to be foreclosed was fraudulent and void as against these appellants who were creditors of said firm of B. W. Payne & Sons, because it was executed and delivered with intent to hinder, delay and defraud creditors, is not tenable. (*Billings v. Russell*, 101 N. Y. 226; *Davis v. Schwartz*, 155 U. S. 631; *F. Nat. Bank v. Miller*, 163 N. Y. 164; *Brown v. Crabb*, 156 N. Y. 447; *Crim v. Starkweather*, 136 N. Y. 633; *White v. Benjamin*, 150 N. Y. 258; *Holden v. Burnham*, 63 N. Y. 74; *N. S. Bank v. Wheeler*, 40 App. Div. 563; *Roberts & Co. v. Buckley*, 145 N. Y. 215; *Sherman v. Foster*, 158 N. Y. 587.)

WERNER, J. This action was brought to foreclose a mortgage dated Sept. 3, 1896, executed by Benjamin N. Payne, David W. Payne, Sarah R. Payne, Esther A. R. Payne and Mary L. Payne to the plaintiff.

Said mortgagors, with the exception of Esther A. R. Payne, who was the wife of Benjamin N. Payne, were members of the firm of B. W. Payne & Sons. The mortgage covered both real and personal estate. It was not filed as a chattel mortgage, or recorded as a real estate mortgage, until Sept. 30, 1896, and in the interim the mortgagors remained in possession of all the property, except such personal property as was disposed of in the ordinary course of business.

It is conceded by all the parties to the action that, as there was no immediate and continued change of possession of the mortgaged personal property, the failure to promptly file this instrument as a chattel mortgage rendered it invalid as such against the creditors of the mortgagors.

The plaintiff asserts no rights under said instrument, so far

as it purports to be a mortgage of personal property, and merely seeks to enforce it as a lien upon the real estate described in the complaint. The appellants, as judgment creditors of the mortgagors, attack the instrument as a whole, under the claim that since it is invalid as a chattel mortgage it is void *in toto*. This contention would undoubtedly be sound if the alleged invalidity of the instrument as a chattel mortgage were based upon actual, as distinguished from presumptive, fraud. But this is not the case presented by the evidence and the findings of the trial court. The record discloses, and the court has found, that the mortgage was given in good faith, for an honest and ample consideration, and with no intent to hinder, delay or defraud other creditors of the mortgagors. Therefore, the only question before us is whether the purely technical or statutory invalidity of this instrument as a chattel mortgage affects its validity as a mortgage upon real estate.

It will be observed that under the statute relating to the filing of chattel mortgages such an instrument may be void without being tainted with any inherent vice. It is declared to be void simply because it is not filed. On the other hand, a chattel mortgage, though filed in strict compliance with the statute, may be actually fraudulent and, therefore, void. This seems to be the distinction upon which the decision of the court below is based. The failure to file the instrument, coupled with the mortgagors' neglect to take and keep possession of the mortgaged personal property, rendered it presumptively void as a chattel mortgage. But it was recorded as a mortgage of real estate before the appellants recovered their judgments against the mortgagors, and under the statute applicable to the latter class of instruments it was valid as a real estate mortgage. The instrument being dual in character, and governed by different statutory regulations affecting its validity as against creditors of the mortgagors, its several parts are separable unless the whole instrument is tainted by some actual fraud. This legal principle is illustrated in *Curtis v. Leavitt* (15 N. Y. 96) in the following language: "A doc-

trine which is expressed in the words *void in part, void in toto*, has often found its way into the books and judicial opinions as descriptive of the effect which a statute may have upon deeds and other instruments which have in them some forbidden vice. There is, however, no such general principle of law as the maxim would seem to indicate. On the contrary, the general rule is, that if the good be mixed with the bad, it shall, nevertheless, stand, provided a separation can be made. The exceptions are: *First*. Where a statute, by its express terms declares the whole deed or contract void on account of some provision which is unlawful; and, *second*, where there is an all-pervading vice, such as fraud, for example, which is condemned by the common law, and avoids all parts of the transaction because all are alike infected."

The cases of *Booth v. Kehoe* (71 N. Y. 341) and *Darling v. Rogers* (22 Wend. 483) are also precisely in point and uphold the same doctrine. There are other cases arising out of controversies over conflicting clauses of wills, some of which are valid and others invalid, where this principle has been applied, of which the following are examples: *Savage v. Burnham* (17 N. Y. 576); *Post v. Hover* (33 N. Y. 595); *Oxley v. Lane* (35 N. Y. 340); *Locke v. Farmers' Loan and Trust Co.* (140 N. Y. 143), and *Cross v. U. S. Trust Co.* (131 N. Y. 330).

It is perfectly clear, therefore, that an instrument like the one under consideration may be void in part, because declared so by some positive statute, and yet be valid in its other parts, which are governed by different principles of law or other statutory regulations. It is, however, contended by the appellants that this instrument is not merely void, but that it is also fraudulent, and that, as this vice taints this whole instrument, it is invalid as against them.

This argument would be unanswerable if it were sustained by the facts of the case or the conclusions of the trial court. It has the support of neither. That the mortgage was given to secure a *bona fide* debt is conceded. That the plaintiff was actuated by no fraudulent purpose in taking the mortgage is

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expressly decided by the trial court in the following words: "Both the mortgagor and the mortgagees regarded the firm as solvent at the time of the giving of the mortgage, and the purpose of the parties to the mortgage was honest and the mortgage given in good faith, and not with intent to hinder, delay or defraud creditors, and did not in fact have that effect, either as to any of the defendants, or, so far as the evidence shows, as to any creditor of the firm, and none of the defendants were prejudiced by the failure to record or file the mortgage." This conclusion is supported by the evidence. It is true that in the "short decision" rendered by the court, as inadvertently misquoted in appellants' brief, it is made to appear that there was a distinct understanding between the parties that the mortgagors should retain the right to sell the mortgaged personal property and to carry on the business of the mortgagors as it had been theretofore carried on, so long as plaintiff was satisfied with the arrangement. But, according to the printed record, the court made no such finding. It simply found that such was the understanding of the mortgagors. This finding, when read in the light of the whole decision, other parts of which have already been quoted, imports no agreement which taints the transaction with actual fraud.

We think the instrument is valid as a real estate mortgage, and, as there are no exceptions to rulings which require reversal, the judgment of the court below should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, VANN and CULLEN, JJ., concur; LANDON, J., not sitting.

Judgment affirmed.

BENJAMIN L. CONDE, Respondent, v. THE CITY OF SCHENECTADY  
et al., Appellants.

1. MUNICIPAL CORPORATIONS — ASSESSMENT FOR LOCAL IMPROVEMENT — DEFECT APPARENT ON FACE OF PROCEEDINGS. If a provision of a municipal charter requiring an assessment for street paving to be apportioned upon the lots of land abutting on the street "according to the number of feet frontage upon the same" be unconstitutional as taking property without due process of law, the invalidity of an assessment made under it is apparent on the face of the proceedings, and an action in equity to set the assessment aside as a cloud on title cannot be maintained.

2. WAIVER OF CONSTITUTIONAL OBJECTION. A property owner who signs a petition for a street pavement under a charter which requires the cost to be apportioned among the owners according to frontage, necessarily asks that the work be done under the statutory rule and thereby waives any right to object to it upon the ground that it constitutes a taking of property without due process of law.

3. IRREGULARITY IN PROCEEDINGS FOR STREET IMPROVEMENT CURED BY STATUTE. An irregularity in a proceeding for a street improvement consisting in the requirement by the common council of two bonds, one to accompany the bid and to be conditioned that if the bid is accepted the bidder will enter into a contract with the city for doing the work, and the other to be executed on the award of the contract and to be conditioned for its performance, instead of following the provision of the charter which requires one bond to be given when the bid is made, and which is to cover not only the execution of the contract but its performance, will not avoid an assessment when another section of the charter provides that every assessment for the purpose authorized by this title, shall be valid and effectual, notwithstanding any irregularity, omission or error in any of the proceedings relating to the same \* \* \*."

4. VARIANCE BETWEEN PETITION AND ORDINANCE AS TO KIND OF PAVING MATERIAL. The variance between a petition for the paving of a street which asked for "Trinidad sheet asphalt" and the ordinance directing the street to be paved with "Asphaltum sheet pavement," the specifications requiring the material to be "refined lake asphalt" and distinctly excepting land or overflow asphalt, does not invalidate an assessment for the pavement even if the term "lake asphalt" is more comprehensive than "Trinidad asphalt" where Trinidad asphalt was actually used and there is no proof to show that the exclusion in the specifications of land and overflow asphalt was improper.

5. CITY OF SCHENECTADY — EXPENSE OF REPAVING STREET INTERSECTIONS. The amendment of section 59 of the charter of the city of Schenectady (L. 1890, ch. 294, as amd. by L. 1893, ch. 190), by omitting the provision that the cost and expense of repaving the street intersections

164	258
165	155
164	258
166	600
164	258
169	1529



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Statement of case.

should be borne by the city at large, had the effect of imposing the whole cost of repaving a street on the abutting lots.

6. METHOD OF PAYING ASSESSMENT. Under section 61 of the charter of the city of Schenectady, the determination whether an assessment for repaving a street shall be payable in installments or not is, in the absence of request by the petitioners for the improvement, vested in the common council.

*Conde v. City of Schenectady*, 29 App. Div. 604, reversed.

(Argued June 20, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 9, 1898, affirming a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

*S. W. Jackson* for appellants. The Appellate Division erred in affirming the judgment below upon the ground that the ordinance and specifications for the pavement in question varied essentially from the petition of the property owners, and that, therefore, the common council had no jurisdiction to adopt such ordinance and specifications, and, therefore the assessment in question is illegal and void. (*Bell v. City of Yonkers*, 78 Hun, 202; *Voght v. City of Buffalo*, 133 N. Y. 468; *Matter of M. L. Ins. Co.*, 89 N. Y. 535; *O'Reilly v. City of Kingston*, 114 N. Y. 446; *Tift v. City of Buffalo*, 82 N. Y. 204; *Terrel v. Wheeler*, 123 N. Y. 76; *Leman v. Mayor, etc.*, 55 N. Y. 361; *Brown v. Mayor, etc.*, 63 N. Y. 239; *Cromwell v. McLean*, 123 N. Y. 490; *Ensign v. Barse*, 107 N. Y. 338.) Plaintiff's claim that the plans and specifications were not legally made or adopted by the common council, nor approved by the mayor, and that for such reason the assessment in question is void, is not supported by law nor by the evidence. (*Voght v. City of Buffalo*, 133 N. Y. 463; *Gilmore v. City of Utica*, 131 N. Y. 31.) The provisions of section 72 of the charter, declaring that "every assessment for a purpose authorized by this title shall be valid and effectual,

notwithstanding any irregularity, omission or error in any of the proceedings relating to the same," make the various objections of the plaintiff's counsel to the proceedings relating to the assessment in question ineffective. (L. 1890, ch. 294.)

*Robert J. Landon* for respondent. The plans and specifications were invalid in that they did not conform to the directions of the ordinance as to the materials to be used and the manner of doing the work. (*Matter of Burmeister*, 76 N. Y. 174; *Folmsbee v. City of Amsterdam*, 142 N. Y. 118.) Section 72 of the charter does not cure any of the objections to this assessment. (*Gilmore v. City of Utica*, 131 N. Y. 26; *Ensign v. Barse*, 107 N. Y. 329; *Merritt v. Vil. of Portchester*, 71 N. Y. 314; *Jew v. Mayor, etc.*, 103 N. Y. 536; *Matter of Pennie*, 108 N. Y. 364; *Miller v. City of Amsterdam*, 149 N. Y. 288; *Sharp v. Spier*, 4 Hill, 76; *Matter of Douglas*, 46 N. Y. 42; *Matter of Astor*, 50 N. Y. 363; *Matter of Anderson*, 60 N. Y. 457; *May v. Traphagen*, 139 N. Y. 478.) The action is maintainable to remove a cloud on plaintiff's title, to prevent the creation of a further cloud, and because the sale, if otherwise valid, would have been premature if not enjoined. (*Marsh v. City of Brooklyn*, 59 N. Y. 283; *Guest v. City of Brooklyn*, 69 N. Y. 513; *Townsend v. Mayor, etc.*, 77 N. Y. 542; *King v. Townsend*, 141 N. Y. 361; *Mellen v. Mellen*, 139 N. Y. 221; *Butler v. Johnson*, 111 N. Y. 219; *O'Flynn v. Powers*, 136 N. Y. 423; *McK. B. Co. v. Trustees, etc.*, 15 App. Div. 139; *Poth v. Mayor, etc.*, 151 N. Y. 16; *Trippler v. Mayor, etc.*, 125 N. Y. 617.)

CULLEN, J. This action was brought to set aside an assessment imposed for the repaving of State street, in the city of Schenectady, and to restrain a threatened sale for non-payment of the assessment. By section 51 of the charter of the city (Chap. 385, Laws of 1862, as amended by chap. 294, Laws of 1890; chap. 190, Laws of 1893) it is provided that no ordinance shall be adopted directing the pavement of the car-

riageway of a street with any other material than cobble stone, broken stone or gravel, except upon a petition in writing, duly proved and acknowledged, by owners of lots abutting on the street constituting at least one-fourth of the frontage thereon. By sections 52 and 53 it is further provided that no ordinance shall be adopted until a hearing has been given all persons interested after publication of the proposed ordinance. In July, 1894, a petition was presented to the common council, signed by the plaintiff and others, asking for the paving of State street with Trinidad sheet asphalt pavement, excepting the space occupied by the railroad tracks, which it was asked should be paved with granite blocks. Thereupon the common council adopted a proposed ordinance for paving the street with "asphalt sheet pavement." After publication and a hearing, the common council, on July 31st, enacted the proposed ordinance. The common council then adopted specifications for the work by which it prescribed that the paving should be laid of "the best quality of refined Lake Asphalt (distinctly excepting land or overflow asphalt) and heavy petroleum oil, unmixed with any of the products of coal tar." Bids for the work were advertised for. The contract was awarded to the Metropolitan Paving and Construction Company of the city of New York, which was the lowest bidder. The street was repaved under this contract with Trinidad asphalt, and an assessment for the cost laid on the abutting property. No attack on the character of the work is made, and no proof was adduced showing any fraud in the award of the contract or in the charge made for the work thereunder. The assessment, however, is alleged to be void because of irregularities and illegalities committed by the common council in the proceedings to effect the improvement and in laying the assessment therefor, which invalidity it is contended will not appear on the face of the proceedings, since by the charter the resolution of the common council making the assessment is presumptive evidence in all courts that the assessment was legally imposed, and that all notices and proceedings required therefor were duly given and taken.

The points of attack on the assessment are numerous, and it is necessary to consider them in detail.

The charter (Section 59) requires the cost of the improvement to be apportioned upon the lots of land abutting on the street, "according to the number of feet frontage upon the same." It is claimed that such a rule of assessment is determined by the Supreme Court of the United States (*Norwood v. Baker*, 172 U. S. 269) to be in contravention of the Federal Constitution as taking property without due process of law. We think that a plain distinction can be drawn between the *Norwood* case and the one before us. In the former, the improvement was the opening of a street through the lands of the plaintiff, in which he was undoubtedly entitled to compensation for the land taken, a right of which he could not be constitutionally deprived. The same statute authorized the local authorities to assess the cost of the improvement and the expense of the proceeding upon the remaining lands of the plaintiff according to frontage and regardless of benefit. The effect of this double proceeding of eminent domain and taxation was that the plaintiff lost his land without compensation, and was compelled to pay the expense of having the land taken away from him. These provisions of law were held to violate the Federal Constitution. In the present case no land is taken from the plaintiff. The proceeding is purely in the exercise of the power of taxation. That the land abutting on the street is benefited by the pavement or repavement of the street and should bear the expense seems very clear. Even where no provision is made by law for the apportionment of the expense according to the frontage of the land abutting on the street, the equity of the principle is so apparent that the rule has been almost universally adopted through the municipalities of this state. The case differs from the opening of a street or avenue, the main object of which improvement may, in special cases, be not to benefit the abutting land, but to afford access and communication between separate parts of the city or village, and thus inure to the advantage of the whole municipality. It seems to us that this distinction is justified

by the previous decision of the Supreme Court in *Parsons v. District of Columbia* (170 U. S. 45), and *Leominster v. Conant* (139 Mass. 384), the latter of which is cited with approval in the *Norwood* and *Parsons* cases. But whether the distinction sought to be drawn is well or ill founded, there are two sufficient answers to the plaintiff's claim in this respect. *First*. If the statute is unconstitutional and void the invalidity of the assessment is apparent, and an action in equity to set it aside as a cloud upon title cannot be maintained. (*Stuart v. Palmer*, 74 N. Y. 183.) *Second*. The plaintiff was one of the petitioners for the improvement. The only power the city had in the premises was to do the work at the cost of the abutting owners, to be apportioned among them according to frontage. He necessarily asked that the work be done under that statutory rule, and thereby waived any question as to its constitutionality. A party may waive the benefit of a constitutional provision in his favor. (*Vose v. Cockcroft*, 44 N. Y. 415.)

The ground on which the learned referee held the assessment bad was that the common council in its advertisement for proposals required a proposal to be accompanied by a bond conditioned that if the proposal should be accepted the bidder would enter into a contract with the city for doing the work at the prices stated and give a further bond for its performance, while section 58 of the charter directs that no proposal shall be considered which is not accompanied by a bond conditioned that if the proposal be accepted the person making the same will not only enter into contract for the performance of the work, but also perform the same. In other words, the scheme provided by the charter was that only one bond should be given when a bid was made on the work which was to cover not only the execution of a contract, but its performance; while the course taken by the common council was to require two bonds, one to accompany the bid, the other to be executed on the award of the contract. The referee held that by this departure from the method prescribed by the statute the common council lost jurisdiction to carry out the improvement. We concede the course of the common council to have

been irregular, and we may further concede, for the purposes of the argument, that the irregularity would have been fatal except for other provisions of the charter. Section 72 provides that "Every assessment for a purpose authorized by this title shall be valid and effectual notwithstanding any irregularity, omission or error in any of the proceedings relating to the same. \* \* \* Whenever it shall be deemed by the common council or be determined by the judgment of a court of competent jurisdiction that any assessment authorized by this title is illegal or void for want of jurisdiction, or for any other cause, the common council may pass an ordinance designating the work so made or done, the whole expense thereof, and the part or portion of the city deemed to be benefited thereby, or equitably chargeable with the costs and expense thereof, and may assess the several lots or parcels of land in the territory so designated in said ordinance, according to the benefits received or in the proportion in which they are equitably chargeable therefor." This is a curative act of the most comprehensive character; indeed, it is much more than a curative act. A curative act is a retrospective statute. Here the same statute which prescribes certain formalities and requirements to be observed in making local improvements and in imposing assessments therefor, provides that irregularities or illegalities in the proceedings, *i. e.*, failure to comply with these requirements and formalities, shall not invalidate the assessment. Therefore, any informality that the legislature might have originally dispensed with cannot avoid the assessment. (*Ensign v. Barse*, 107 N. Y. 329.) It was doubtless the duty of the common council to have strictly conformed to the law in the prosecution of this improvement, and had the plaintiff timely intervened by a taxpayer's action he could have restrained the common council from acting in contravention of the statute, but he could not lie by and await the completion of the improvement and then escape the assessment because of irregularities or defects in the proceedings. It was this very evil that the section of the charter cited was intended to prevent.

The learned Appellate Division did not pass upon the point on which the case was decided by the referee, but affirmed the judgment upon another ground. That court held that the common council had no jurisdiction to adopt an ordinance for any other kind of pavement than that which was called for by the petition, and that in the ordinance there was a substantial departure from the petition. The petition asked for "Trinidad Sheet Asphalt;" the ordinance directed the street to be paved with "Asphaltum Sheet pavement." The specifications required the material to be "Refined Lake Asphalt" distinctly excepting "land or overflow asphaltum." The street was actually paved with Trinidad lake asphalt. The Appellate Division took notice that lake asphalt was Trinidad asphalt, but was of opinion that in excluding the land or overflow asphalt there was a departure from the terms of the petition which tended to restrict competition and might have enhanced the cost of the work. We cannot agree with this view. While it may be that we cannot take notice that lake asphalt and Trinidad asphalt are the same there is no proof that they are different materials. The plaintiff got exactly what he asked for, Trinidad asphalt. For this reason if the term "Lake Asphalt" is more comprehensive than "Trinidad Asphalt" it worked no injury to the petitioners, and if it had any effect on the bidding it must have increased the competition. By section 57 of the charter, the common council was authorized to make plans and specifications for the improvement. There is no proof to show that the exclusion of "Land and overflow asphalt" was an improper requirement. If the petition had been for wooden blocks, the specifications might properly exclude those kinds of wood which are not fit for pavement; and even had it specified oak blocks, it would have been within the power of the common council to exclude inferior kinds of oak. Further, under the view we have already expressed, the time for the plaintiff to have raised any objection was at the inception of the work.

Section 59 of the charter as enacted in 1890 provided that the cost and expense of repaving the street intersections

should be borne by the city at large. This section was amended in 1893 (Chapter 190) by omitting the provision quoted. The effect of this amendment was to impose the whole cost of the improvement on the abutting lots. There was, therefore, no error in the assessment in this respect. Under section 61 the determination whether the assessment should be payable in installments or not was, in the absence of request by the petitioners for the improvement (there was none in this case), vested in the common council. The other irregularities complained of we shall not discuss. Some of these alleged irregularities we think are not such, and the others are cured so far as the validity of the assessment is concerned by the provisions of section 72.

The judgment appealed from should be reversed and a new trial granted, costs to abide the final award of costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, VANN and WERNER, JJ., concur; LONDON, J., not sitting.

Judgment reversed, etc.

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EDWARD S. STOKES, Respondent, v. GRAHAMS POLLEY,  
Appellant.

1. EVIDENCE—WHEN ADMISSIBLE ALTHOUGH NOT PLEADED. Where promissory notes are executed by the maker pursuant to the terms of a written agreement for the sale of stock of a corporation, which was the consideration for the notes, and which agreement bound him to deliver them to the payee, and the former delivers them to a third person, and the defense in an action for damages for non-delivery of two of the notes is that the delivery to the third person was by plaintiff's direction, and defendant has testified to such direction, although not pleaded, evidence is admissible of a parol agreement between the plaintiff and such third person that the latter should receive the notes in suit as indemnity for an undertaking by him and another as sureties for plaintiff and also to show the extent of that liability and how plaintiff's sale of the stock without some resulting indemnity would increase the risk assumed by the sureties, since it is a circumstance corroborative of the evidence supporting the real defense.

2. WHEN PAROL EVIDENCE NOT AN ATTEMPT TO VARY WRITING. Where the written agreement provided that certain of the notes covered



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thereby should be deposited by the plaintiff with a trust company to indemnify the third person and others as sureties upon an undertaking in plaintiff's behalf, but left him in full control of the remaining notes, including those in suit, and they are delivered to such third person, evidence of such parol agreement is not an attempt to vary the written agreement by parol evidence.

3. FACTS INSUFFICIENT TO TAKE CASE FROM JURY. Where the notes were delivered to such third person under the claim that the delivery was by plaintiff's direction, the facts that an alteration made in them as a correction was made without plaintiff's consent and for that reason they were returned to the defendant who replaced them by new notes correctly drawn, and that after the first delivery and before such replacement the alleged authority for delivery to the third person was revoked by the plaintiff, are not sufficient to justify the court in taking from the jury the issue of fact whether the original delivery was by plaintiff's authority and before the notice of its revocation.

*Stokes v. Polley*, 80 App. Div. 550, reversed.

(Argued June 22, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 20, 1898, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court, and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*David McClure* for appellant. It was error to hold that a revocation of the agency was effected by the substitution of two new notes for those which were destroyed. (*People v. N. R. S. R. Co.*, 121 N. Y. 617; 1 Am. & Eng. Ency. of Law, 1218; *Hunt v. Rousmanier*, 8 Wheat. 174.) It was error to deny the defendant's motions to go to the jury and for a new trial, and to direct a verdict for the plaintiff. (*Cagger v. Lansing*, 64 N. Y. 427; *Corning v. T. I. & N. Factory*, 44 N. Y. 594; *Gildersleeve v. Landon*, 73 N. Y. 609; *Kavanagh v. Wilson*, 70 N. Y. 179; *Munoz v. Wilson*, 111 N. Y. 300; *Dean v. M. E. R. Co.*, 119 N. Y. 550.)

*Charles E. Hughes* for respondent. The court properly excluded evidence of the pretended agreement with James D.

Leary. (*Hunt v. Rousmanier*, 8 Wheat. 205; 1 Am. & Eng. Ency. of Law, 1217, 1218; Abb. Tr. Br. 753, § 954; *Smith v. Hall*, 67 N. Y. 48; *Saunders v. Chamberlain*, 13 Hun, 570; *Russell v. Clapp*, 7 Barb. 482; *Jackson v. Whedon*, 1 E. D. Smith, 141; *Spooner v. D., L. & W. R. R. Co.*, 115 N. Y. 30; *Thomas v. Scutt*, 127 N. Y. 133; *Eighmie v. Taylor*, 98 N. Y. 288; *Marsh v. McNair*, 99 N. Y. 174; *Mott v. Richtmyer*, 57 N. Y. 49.) The court properly directed a verdict for the plaintiff. (*Blade v. Noland*, 12 Wend. 173; *Arrison v. Harmstaed*, 2 Penn. St. 191; Taylor on Ev. § 116.)

LANDON, J. The defendant excepted to the denial of his request to go to the jury, and to the direction of a verdict for the plaintiff; also to the exclusion of evidence offered by him. The questions of law thus presented are before us for review.

The controversy is over two notes of \$15,000 each which the defendant agreed to deliver to the plaintiff, but which he in fact delivered to James D. Leary, and the main issue upon the trial was whether the plaintiff had authorized and directed such delivery, or, if he had done so, whether he recalled or countermanded the direction before the defendant actually delivered the notes to Leary.

The written agreement between the plaintiff and the defendant, to which James D. Leary, Daniel J. Leary and R. T. McDonald were also parties, required the defendant to pay to the plaintiff \$25,000 in cash, and the further sum of \$115,000 in seven notes to be made by the defendant and guaranteed by the Learys and McDonald upon plaintiff's delivery to the defendant of 1,300 shares of the capital stock of the Hoffman House. This agreement was made and bore date September 27, 1897. The plaintiff delivered the shares of stock to the defendant September 28, 1897.

The complaint alleges that the plaintiff had then already received the \$25,000 from the defendant, but that the defendant had not made or delivered any of the notes to the plaintiff, but did thereafter deliver to him, first, one note for

\$30,000, and next, the four other notes aggregating \$55,000, but failed and refused to deliver to him the two notes, one at six months and one at eight months, each for \$15,000, and hence the plaintiff asks judgment for \$30,000 and interest.

The defendant's answer is that "it was understood and agreed at or about the time when the shares of stock were delivered as set forth in the complaint, that all the notes referred to therein should be delivered to James D. Leary, referred to in said complaint as the representative and agent of the plaintiff, and the defendant was directed to and did deliver them to said Leary by the authority and direction and with the knowledge of the plaintiff;" and also alleges that "said delivery was made to the plaintiff through his representative and agent, James D. Leary, who received them from the defendant by the direction and authority of the plaintiff."

The written contract and the seven notes were prepared at the Hoffman House on the 25th of September, 1897, at a meeting of all the parties to the contract except the defendant, who was not present. The parties, except the defendant, then signed the contract, and the two Learys and McDonald indorsed the notes. The Learys retained the possession of the notes and contract, and on September 27th presented the contract to the defendant and he then signed it.

The 1,300 shares of stock, the subject of the sale, were then held by the Chemical Bank as collateral to a loan of \$30,000 made by the bank to the plaintiff. On the next day the bank delivered the stock to the plaintiff upon Mr. J. D. Leary's promise to replace it with the \$30,000 note, one of the seven notes mentioned in the written contract. The plaintiff then delivered the stock to the defendant on Mr. J. D. Leary's promise to plaintiff to procure the notes. The notes were not signed that day because they were in the custody of David J. Leary, who was not present, but the note for \$30,000 was signed by the defendant the next morning, September 29th, at the Hoffman House. The defendant testified that he received it from James D. Leary, signed it, then

handed it to Mr. Leary, who handed it to the plaintiff. The defendant further testified that the plaintiff then and there told him to give the balance of the notes to Mr. Leary, and that the plaintiff also told him at the Chemical Bank to give the balance of the notes to Mr. Leary when they were signed, and that the plaintiff there told Mr. Leary to keep the notes. The plaintiff did not contradict this testimony, and it was corroborated by other witnesses. The four notes, aggregating \$55,000, were subsequently signed and deposited with the Knickerbocker Trust Company.

The defendant offered evidence tending to prove an agreement between the plaintiff and Leary by which Leary was to receive these two notes from the defendant and hold them as indemnity against his and D. J. Leary's liability as sureties for the plaintiff as receiver of the Hoffman House corporation and also as sureties in an action against the corporation itself, and also to show the extent of that liability and how the plaintiff's sale of this stock without some resulting indemnity would increase the risk assumed by the Learys. The evidence was excluded.

The Appellate Division sustained the exclusion because such a defense was not pleaded and because it was an attempt to vary by parol a written instrument under seal.

I do not think either ground tenable. If such an agreement existed it would account for the direction alleged by the defendant to have been given by the plaintiff to him to deliver the notes to Mr. Leary and thus add credibility to the defendant's testimony that the plaintiff did give him such a direction. If the plaintiff and Leary had made such an agreement, then the plaintiff's direction to the defendant was an obvious consequence of it.

The court, in excluding evidence of the agreement between Stokes and Leary by which Leary was to receive the two notes, excluded the evidence tending to prove the agency of Leary to receive them, as between Leary and the plaintiff. Clearly the defendant would make a stronger case if, in addition to proving the agency as between plaintiff and himself,

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N. Y. Rep.] Opinion of the Court, per LANDON, J.

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he should prove it as between the plaintiff and Leary. It was not necessary to plead the plaintiff's separate agreement with Leary, since it was not a defense, but it was a circumstance corroborative of the evidence which supported the real defense, namely, that defendant delivered the notes to Mr. Leary as the plaintiff told him to do. It was not necessary to plead the corroborative evidence.

The argument to support a variance of the written agreement by the parol evidence will not bear scrutiny. It is true that the written agreement provides that the plaintiff shall deposit \$55,000 of the notes with the Knickerbocker Trust Company to indemnify the two Learys and McDonald against their liability as sureties upon the plaintiff's appeal bond in an action then pending upon appeal against him, but this agreement is in consideration of their guaranteeing all the notes—seven of them—aggregating \$115,000. No doubt this guaranty was important, and it was also important to be able to show that it was made upon sufficient consideration, and, therefore, it was proper to insert it in the agreement. This written agreement left the plaintiff free to dispose of the other notes and of the cash part of the consideration of his sale of stock to whom he pleased and in any way he pleased, and if, before the written agreement or after it, he provided for such disposition, he simply provided for dealing with his own after it should become such; that is to say, he appointed Leary to receive the notes and notified the defendant, thus making defendant's delivery to Leary delivery to himself. Such provision for appointment and disposition is not at variance with the written agreement, but is in furtherance of it.

Another phase of the case needs consideration. If we credit the defendant's evidence, after the plaintiff had directed the defendant to deliver the notes to Leary, and the defendant had done so, the plaintiff changed his position, and demanded the notes of the defendant. The notes were drawn to the order of the plaintiff but not indorsed by him, nor did they bear interest. While in Leary's hands the two notes were

altered without the plaintiff's consent, by substituting the word "bearer" for "order," and by adding the words "with interest." Mr. Leary apparently becoming apprehensive that this alteration was unauthorized, requested the defendant to give him new notes, and handed him the original notes. The defendant destroyed the notes and gave Mr. Leary new notes in their stead. This was after the plaintiff had demanded the original notes of defendant.

The trial court held that as the defendant thus had the original notes in his possession after the plaintiff had signified his revocation of whatever direction the plaintiff had previously given him to deliver the same to Mr. Leary, it was the defendant's duty to deliver them to the plaintiff instead of destroying them. However this might be if no interest in the notes had accrued to Leary by virtue of some contract between him and the plaintiff, under which he held possession of them in aid of such interest, yet if Leary had acquired some interest in the notes with the right to their possession in protection of his interest, then the defendant had no right upon the mere receipt of the notes for the purpose of repairing a wrong or mistake, to violate or confiscate Leary's interest in and right to the possession of the notes. Such an act would be a breach of trust, of good faith and of defendant's duty as temporary bailee of the notes for a special purpose. If Leary's claim was not well founded, it may be gravely doubted whether it was defendant's duty to take advantage — apparently dishonorable — of such a circumstance to advance the plaintiff's title to the notes. If Leary's claim to the notes was well founded, the defendant did the plaintiff no legal wrong. If well founded, then the plaintiff should have been permitted to show that he did the defendant no wrong by showing that as between Leary and the plaintiff, Leary was entitled to the notes. As the quality of the defendant's act in destroying the original notes depended upon the rights of the plaintiff and Leary as between each other, the defendant was prejudiced when he was not permitted to show such rights.

The trial court assumed, as a matter of law, that since the

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original notes bore no interest, the notes thus made should not be considered as in performance of the contract. This view and the substitution by defendant of new notes at the request of Leary seem to have led to the exclusion of much of the evidence offered by the defendant, and to the refusal to submit the case to the jury. That the \$115,000 to be evidenced by the notes should bear interest is clear from the written agreement, but the agreement is not explicit that the notes should express it. Indeed, when the plaintiff received the note for \$30,000 the absence of the words "with interest" was remarked at the bank where the plaintiff substituted it as collateral in place of the stock he sold to the defendant, and the defendant thereupon gave to the plaintiff his check for the interest.

The complaint assumes that these two original notes were proper in form and were such as the contract specified. The plaintiff's cause of action is founded upon their non-delivery to himself in person, not upon any defect in the notes themselves. The amount they represented bore interest under the the contract, and it does not appear to be important whether the notes expressed interest or not; the complaint alleges that they did; they were prepared by the plaintiff for execution by the defendant, and the inference is strong that they were satisfactory to the plaintiff. If there was any question whether the two notes were such as the contract called for under the plaintiff's practical construction of it, upon which the defendant acted, it was a question of fact for the jury, and not of law for the court.

We think the court erred in excluding the evidence alluded to and in not submitting the question to the jury upon the evidence given, whether the defendant delivered the notes to Leary pursuant to plaintiff's direction and before notice of its countermand.

The judgment should be reversed, new trial granted, costs to abide the event.

PARKER, Ch. J. (dissenting). The carefully prepared opinion, in which all the court concur, fully justifies, it seems to

me, the conclusion of the Appellate Division that the trial court rightly directed a verdict in favor of the plaintiff. By an agreement in writing the defendant agreed to give, for a consideration which he admits he has received, two promissory notes of fifteen thousand dollars each, as well as other notes and money. Plaintiff, not having received the two notes, brought this action to recover the amount for which they were to be given, with interest. The answer in nowise challenges the validity of the contract or that under it the plaintiff was entitled to receive the two notes, nor is it claimed therein that the notes were ever given to the plaintiff personally, but it alleges that the notes were made and delivered to one James D. Leary "as the representative and agent of the plaintiff, and the defendant was directed to and did deliver them to said Leary by the authority and direction and with the knowledge of the plaintiff." The only issue tendered by the pleadings, therefore, was whether the delivery of the notes to Leary was a delivery to the plaintiff's representative and agent at his request, and the only question which the trial court had to decide, when requested to direct a verdict in favor of the plaintiff, was whether the defendant had established that he had delivered the two notes now in existence to Leary as the agent of the plaintiff and at his request, or had presented such evidence as entitled him to have that question submitted to the jury.

A complete mastery of the material facts makes the question one very easy of correct decision. There were three parties to the agreement, the plaintiff being the party of the first part, the defendant the party of the second part and James D. Leary, Daniel J. Leary and R. T. McDonald the parties of the third part. The subject of the agreement was Hoffman House stock of the par value of one hundred and thirty thousand dollars, then owned by the plaintiff, for which it was provided in the contract that the defendant should pay, upon delivery, one hundred and forty thousand dollars, as follows: Twenty-five thousand in cash and one hundred and fifteen thousand in seven notes to be made and delivered by the



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defendant; one for thirty thousand dollars, payable in four months; five for fifteen thousand dollars each, payable in five, six, seven, eight and nine months respectively, and one for ten thousand dollars, payable in ten months; all to bear six per cent interest. The parties of the third part were sureties for the plaintiff in some litigation then pending in the courts, and the agreement provided that they should guarantee the payment of the seven notes in consideration of a deposit of fifty-five thousand dollars thereof with the Knickerbocker Trust Company, protecting them from loss by reason of such suretyship. The agreement was signed by all the parties except the defendant, on the evening of September twenty-fifth, 1897; and James D. Leary, who, it now appears, was jointly interested with the defendant Polley and with McDonald in the purchase of the stock, took the agreement to obtain Polley's signature, which was affixed on the following Monday, the twenty-seventh. The next day the plaintiff and the defendant, with James D. Leary, met at the Chemical Bank for the purpose of carrying out the agreement. That bank held the certificates of stock as security for a loan to the plaintiff of thirty thousand dollars. The plaintiff asked for the seven notes, which the agreement provided he should have upon the delivery of the stock. Mr. Leary said that "his son had them on the speedway and he had forgotten to have them there with him." No other reason was suggested for their non-delivery, and Mr. Leary promised that he would get the notes for the plaintiff. The defendant and Leary were so anxious to have the transaction closed that the bank finally agreed to release the stock, upon Leary's guaranty that the thirty-thousand-dollar note should be delivered to the bank the next morning, and the plaintiff consented to a delivery of the stock upon being given a writing by defendant acknowledging the receipt of thirteen hundred shares of stock in pursuance of the agreement and the personal assurance of Leary that he would get the notes for him. It was during this conversation at the bank that the defendant claims that the plaintiff directed him. after signing the notes, which it seems he had not yet done,

to "give them to Mr. Leary," a statement wholly inconsistent with the plaintiff's attitude throughout all that interview, according even to the defendant Polley's testimony. He testifies: "When we met at the Chemical Bank Mr. Stokes asked for these seven notes. \* \* \* Q. When Mr. Stokes asked Mr. James Leary for those notes did Mr. James Leary give any reason for not delivering them except that his son had them? A. No other reason. That is the only reason. Mr. Stokes was being asked to surrender the stock then. I don't recollect when Mr. Leary said his son had them, that he said how soon he would get them for Mr. Stokes. He told him that his son had them, he would get them. I don't recollect how soon he said he would get them. *When Mr. Leary told Mr. Stokes he would get him the notes Mr. Stokes then handed the stock over to me.* I gave my receipt for it. \* \* \* I won't say that he said he would get them for Mr. Stokes; I can't say that. He promised to get them." The plaintiff's demand for the notes, his insistence upon a receipt from the defendant showing that the stock had been delivered in pursuance of the agreement, before he would surrender it, and the promise of Leary that he would get him the notes, undoubtedly present the situation as it was in fact, and as it was understood by all of the parties; yet it may be conceded that the defendant might have been entitled to have the jury pass on the credibility of his further statement, that in the same conversation the plaintiff told him to give the notes to Leary and that he did so, were it not for the fact that such notes were afterward returned to defendant, who destroyed them, and then gave to Leary new notes. Before this happened, however, the defendant concedes that the plaintiff had told him that Mr. Leary had no business to have the notes, and that plaintiff had demanded them of defendant again and again. The defendant also testifies that "He (Mr. Stokes) threatened suit anyway, because I didn't give him the notes. And after he threatened suit because I would not give him the notes those notes came back into my possession, and I destroyed them. \* \* \* After that I knew he was threat-

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ening to sue me because I didn't give them to him. And I knew that when I destroyed the notes." So, if it could be held that the defendant's statement that the plaintiff told him to give the notes to Leary, borne down as it is by the written agreement, the defendant's other testimony and all of the facts and circumstances surrounding the transaction, presents a question of fact in that regard, still we find that the notes, which he claims to have delivered in pursuance of that request, were delivered to and destroyed by him after the termination of the alleged agency and with knowledge thereof.

That transaction is one of controlling importance, and the defendant's version of it is as follows: "I mean to say that the two notes in question here, which I signed the day after the meeting at the Chemical Bank, are still in Mr. Leary's hands. I suppose they are in his hands. \* \* \* Q. The two notes in question here? A. They are not in existence now. I saw them destroyed. I was present when they were destroyed. \* \* \* After I made them I destroyed them. \* \* \* Q. When you destroyed those notes where did it take place? A. At Mr. Leary's house. Nobody asked me to destroy them. I destroyed them myself. Mr. Leary gave them to me. He did not tell me to destroy them. I destroyed them myself and tore them up myself. No talk, no reason, no statement of the reason. \* \* \* The notes were given to me, and I tore them up. When Mr. Leary gave them to me he did not tell me to destroy them. I destroyed them. I said I would destroy them. They were wrong; there was a mistake. Q. Who told you there was a mistake? A. I see it myself they were wrong. *They gave them to me because they were wrong.* \* \* \* I don't know whether Mr. Leary or who made them wrong. Mr. Leary never told me anything about it. \* \* \* Q. Is it your recollection that any papers had been served upon you at the time that occurred? A. I don't think there were. I would not say positively." Elsewhere in the testimony it appears that the alterations which the defendant discovered in the original notes consisted of the addition of the words "with interest," and also the words "or

bearer," so as to make the notes payable to bearer. It is significant that these alterations were made while the notes were in the possession of Leary, and, taken in connection with the other steps in the transaction, suggest that, at the meeting in the Chemical Bank, Leary was plotting to secure to the defendant, McDonald and himself possession of the stock, without carrying out in its entirety the contract that he had signed three days before; but in some way it was discovered that the last step in the transaction, by which the notes were made payable to bearer, was something that might be visited with serious legal consequences, and hence the meeting at Leary's house and their destruction by the defendant, because, as he said, they were wrong and had become so after leaving his possession. At that moment the defendant knew that if the plaintiff ever had authorized him to hand the notes to Leary, that authority had been withdrawn; if he once believed that Leary was the plaintiff's agent for the purpose of receiving the notes, he then knew that such agency no longer existed, for the defendant Polley testifies: "And after he threatened suit, because I would not give him the notes, those notes came back into my possession and I destroyed them." Most men would have felt it their duty, at least, to refuse to make new notes until it had been determined whether the plaintiff or Leary was entitled to the notes that Leary contracted to indorse for plaintiff's benefit, and especially so where, as in this case, the party claiming the notes had offered him indemnity, but the defendant Polley preferred to take other action, without either moral or legal right, and he did make new notes and deliver them to Leary. It is urged in his behalf that, having delivered the original notes to Leary, the latter was entitled to the notes issued to take the place of those destroyed. One answer to that proposition is, that the original notes, so-called, did not conform to the contract, in that they were not drawn "with interest," and, therefore, there never was such a delivery to Leary or any one else as satisfied the requirements of the contract. It follows that, when the plaintiff demanded the notes of the defendant and threatened

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suit to get possession of them, the defendant had not at all satisfied the contract, even though it were the fact that Leary had been the plaintiff's agent for the purpose of receiving the notes, for defendant had not delivered such notes as the contract called for, and, hence, had made no delivery thereunder, and, therefore, could not ignore the revocation of the agency by the plaintiff and his demand that the delivery be made to him personally, as was his right under the contract. It would have been error, therefore, for the court to submit the question of agency to the jury, for even if it be conceded that the plaintiff did make Leary his agent, yet, before there was such a delivery as the contract called for, the agency was terminated and the defendant notified of it, so that whether there was originally an agency ceased to be a matter of any importance in the disposition of the motion for the direction of a verdict.

Again, if it be conceded for the purposes of the argument that the notes given to Leary were in conformity with the contract, and the defendant subsequently, because of the wrongful alteration of the notes, or for any other reason, desired to repossess the notes in order that he might destroy them, the fact remains that when he had accomplished that result the plaintiff did not have, either in person or by proxy, the notes which the contract called for and which under it he was entitled to receive. In other words, when the defendant had destroyed the notes he and the plaintiff stood in exactly the same position as though the old notes had never existed, and the defendant's duty remained undischarged. The agency of Leary, if it ever existed, had been terminated, as the defendant well knew, and it was then his duty, under the contract, to comply with the demand of the plaintiff by delivering to him personally the new notes.

It follows that the court did not err in directing a verdict. It is suggested, however, that error was committed in rejecting "evidence tending to prove an agreement between the plaintiff and Leary by which Leary was to receive these two notes from the defendant and hold them as indemnity against

his and D. J. Leary's liability as sureties for the plaintiff as receiver of the Hoffman House Corporation, and also as sureties in an action against the corporation itself, and also to show the extent of that liability and how the plaintiff's sale of this stock, without some resulting indemnity, would increase the risk assumed by the Learys." The Appellate Division sustained the view of the trial court that this evidence was not admissible under the pleadings. No such agreement was pleaded; the answer contained no suggestion that Leary had acquired any interest in the notes by contract or otherwise, but instead that, in receiving the notes, he acted for the plaintiff "as his representative and agent." The defendant was permitted to testify fully as to what was said to him by the plaintiff regarding the disposition of the notes, and no evidence was excluded tending to show that the plaintiff authorized him to deliver the notes to Leary as his representative. The evidence excluded was offered for the purpose of contradicting the defense pleaded and establishing a new agreement between the plaintiff and Leary, conflicting with the terms of the written agreement, in that it provided for a further indemnity than the one specifically mentioned in the writing as the consideration for the indorsement of all of the notes by the Learys, by which new agreement, sought to be established, Leary was to receive the notes in his own behalf and interest. That the evidence was not admissible for that purpose is substantially conceded; but it is said that had the defendant been permitted to show the existence of an agreement between Leary and the plaintiff, by which the latter was to have the notes, that fact might have been regarded by the jury as giving credit to the testimony of the defendant to the effect that he was told to give the notes to Leary as the plaintiff's agent and representative. On the contrary, the evidence would seem to establish that the notes were to be received by Leary on his own account instead of the account of plaintiff. Conceding, however, for the purposes of the argument, that had the evidence been received it would have tended to corroborate, and, to some extent, give credit to the testimony of

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the defendant, still this judgment should not be reversed on that account; for the error, if error it was, was harmless, as the admission of the evidence could not have affected the result. As has already been shown, there was sufficient evidence to go to the jury on the question of the agency of Leary to receive the notes and the authority of the defendant to give them to him. The direction of a verdict, notwithstanding that fact, is supported on the ground that such agency was revoked and the defendant notified of it before the notes now in existence were delivered. If the views expressed in relation thereto be sound, it follows that the defendant was not injured by the exclusion of evidence tending to corroborate, in some degree, the witness who testified positively that he was authorized to give the notes to Leary as plaintiff's agent.

The judgment should be affirmed, with costs.

O'BRIEN, BARTLETT and CULLEN, JJ., concur with LANDON, J., for reversal; VANN and WERNER, JJ., concur with PARKER, Ch. J., for affirmance.

Judgment reversed, etc.

ROCHESTER AND CHARLOTTE TURNPIKE ROAD COMPANY,  
Respondent, v. ROBERT S. PAVIOUR, Appellant.

PAYMENT OF INDIVIDUAL DEBT WITH CORPORATE CHECKS BY OFFICER OF CORPORATION — WHEN PAYEE CHARGEABLE WITH NOTICE OF INCAPACITY AND LIABLE TO RESTORATION. The payee of corporate checks who receives them from the treasurer of the corporation in payment of a debt not owed by the corporation, but in payment of one which he has treated as the treasurer's individual debt, where the latter has no actual or apparent authority to issue such checks either in payment of his own debt or that of a third person, is chargeable with notice of his incapacity to issue them and is bound to inquire as to the real situation, and where he accepts the checks without question and draws the money thereon, he is liable in an action by the corporation to recover the amount paid as money received by him to its use.

*Rochester & C. T. R. Co. v. Pavioir*, 28 App. Div. 623, affirmed.

(Argued June 21, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Supreme Court, entered April 8, 1898, upon an order of the Appellate Division

in the fourth judicial department, overruling defendant's exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial and directing judgment for the plaintiff upon a verdict directed by the court.

In 1896, the plaintiff, a domestic turnpike corporation, operated a turnpike which extended from the city of Rochester to the village of Charlotte, and one Marsenus H. Briggs was, and for several years had been, its treasurer. In June, 1896, the defendant, who resided at Rochester, received a letter from Mrs. O. S. Warren, of Silver City, New Mexico, inclosing four fire insurance policies, and requesting him to collect the premiums upon the same. Said policies were issued by various companies, through Mrs. Warren as their agent, to Walter B. Duffy, a prominent business man of Rochester, upon buildings situated in Pyramid, New Mexico. For several years Mrs. Warren had forwarded similar policies on this property to the defendant, who had collected the premiums for her and remitted the same after deducting the amount agreed upon for his compensation. It was his habit to deliver the policies to Mr. Briggs, who paid him the premiums thereon, sometimes in cash and sometimes by the check of Mr. Duffy or of George C. Buell, another prominent business man of Rochester, but never with the check of the plaintiff. The defendant did not know who was liable for the premiums except as he learned it from the policies, and it did not expressly appear what relation Mr. Briggs sustained to the owner of the property insured. Upon the receipt of said letter in June, 1896, the defendant, according to his custom, delivered the policies to Mr. Briggs, and in July two other policies upon the same property were received from Mrs. Warren, which he also delivered to Mr. Briggs, who was a man of repute and a member of a prominent law firm in Rochester. The premiums were not paid at the time either set of policies was delivered; but after payment had been demanded several times by the defendant, Briggs gave him a check on account, dated June 17th, 1896, drawn upon the



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Points of counsel.

Central Bank of Rochester, payable to the order of the defendant, for \$150, signed "Rochester & Charlotte Turnpike Road Co. M. H. Briggs, Treas." On the 24th of July following, Briggs gave the defendant a check, similar in all respects, except that it was for the sum of \$300, and subsequently he paid the balance of the premiums from his own funds. The defendant deposited these checks in the Traders' Bank of Rochester, where he did his banking business, procured drafts for the amount going to Mrs. Warren, and sent them to her. The checks were paid upon presentation in the ordinary course of business from moneys belonging to the plaintiff on deposit in the Central Bank. This action was brought to recover the amount paid by means of these checks as money of the plaintiff received by the defendant to its use. The plaintiff had no interest in the policies and no business relations with the defendant, and was indebted neither to him nor to Briggs, who used the checks without authority and thus embezzled the money drawn thereby. At the close of the evidence the court directed a verdict for the plaintiff, but ordered the defendant's exceptions to be heard in the first instance by the Appellate Division, which, after hearing the parties, overruled the exceptions and directed judgment upon the verdict in favor of the plaintiff. From said order, as well as from the judgment entered accordingly, the defendant brings this appeal.

*Walter S. Hubbell* for appellant. The defendant had no actual notice of the fraud of Briggs nor was the form of the check sufficient to put him upon inquiry. (*Dike v. Drexel*, 11 App. Div. 77; 155 N. Y. 637; *Cheever v. P. R. R. Co.*, 150 N. Y. 59; *G. Nat. Bank v. State*, 141 N. Y. 379.) Plaintiff's negligence enabled Briggs to perpetrate the fraud and it should, therefore, not be allowed to recover from the defendant. (*N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30.)

*James Breck Perkins* for respondent. The trial court properly held that Paviour could not receive the money of

the plaintiff and apply it to the payment of Briggs' indebtedness. (*Gerard v. McCormick*, 130 N. Y. 261; *Wilson v. M. E. Ry. Co.*, 120 N. Y. 145; *Cheever v. P. R. R. Co.*, 150 N. Y. 59.)

VANN, J. By delivering the policies to Briggs without collecting the premiums at the time, the defendant apparently gave credit for the same and thus made the debt his own. At all events, he subsequently treated it as a debt owing by Briggs to himself, the same as he had similar claims under like circumstances in previous years. Briggs had no authority, either actual or apparent, to give the checks of the plaintiff in payment of his own debt or that of a third person. If the defendant knew or believed, or had good reason to believe, that, in giving the checks, Briggs was appropriating the money of the plaintiff to the payment of his own debt, or one that he treated as his own, he had no right to accept them without inquiry. While he was not bound to be on the watch for facts which would put a very cautious man on his guard, he was bound to act in good faith. (*Second National Bank v. Weston*, 161 N. Y. 520, 526; *Cheever v. Pittsburgh, etc., R. R. Co.*, 150 N. Y. 59, 66.) Even if his actual good faith is not questioned, if the facts known to him should have led him to inquire, and by inquiry he would have discovered the real situation, in a commercial sense he acted in bad faith and the law will withhold from him the protection that it would otherwise extend.

The checks themselves gave notice of a suspicious fact and invited inquiry in relation thereto. They showed upon their face that Briggs was apparently using the money of the plaintiff for his own purposes, since they were not his checks but the checks of a corporation issued by him as its treasurer. In the absence of express authority, or of that which may be implied from past conduct known to the corporation, he could not lawfully use the checks, which stood as its money, for such a purpose, as the defendant is presumed to have known. There was no express authority and nothing to indicate that

Briggs was impliedly authorized to thus use the money of the plaintiff and the presumption was the other way. The plaintiff, as its name indicated, was not a trading corporation but a local plank road company, with no authority to own buildings situated out of the state. It would be extraordinary for a concern which merely operated a short plank road in this state to have any interest in buildings in New Mexico or to be indebted for premiums upon policies issued thereon, and the admitted facts compel us to assume that the defendant so regarded it. Moreover, the policies themselves, as the defendant knew, were not issued in the name of the plaintiff as the owner of the buildings, and there was no connection, apparent or otherwise, between it and the policies. Without inquiry he accepted checks drawn by Briggs as treasurer of the plaintiff in payment of a debt which he had no reason to believe was for it to pay, and which he had strong reason to believe had become the debt of Briggs himself. He called for no explanation from him, made no inquiry at the office of the plaintiff, or of any one representing it, which would naturally have disclosed the fraud, but accepted the checks without question, drew the money and thereby ran the risk of being called upon to restore it.

The facts known to the defendant should have aroused his suspicion and led him, as an honest man, to make some investigation before he accepted the money of a corporation, which owed him nothing, in payment of a claim that he held against some one else. If he had such confidence in Briggs that he was willing to trust him without inquiry, under suspicious circumstances of a substantial character, he must stand the loss, for he failed to discharge a duty required by commercial integrity. He could not confide in Briggs at the expense of the plaintiff, after notice of his irregular and doubtful conduct. Among the heaviest losses in business are those which result from a blind trust in men on account of their standing in the community, without making the investigation required by common prudence. There was a shadow on the checks, and the defendant could not, in good faith, accept them until

it disappeared. By accepting them he did an act which he had reason to believe would affect the rights of a third party, and he could not, in justice to that party, ignore the suspicion which the facts should have aroused. One who suspects, or ought to suspect, is bound to inquire, and the law presumes that he knows whatever proper inquiry would disclose. While the courts are careful to guard the interests of commerce by protecting the negotiation of commercial paper, they are also careful to guard against fraud by defeating titles taken in bad faith, or with knowledge, actual or imputed, which amounts to bad faith, when regarded from a commercial standpoint. (2 Randolph's Com. Paper [2d ed.], § 999; 1 Daniel's Negotiable Instruments [4th ed.], § 775; 1 Edwards' Bills & Notes [3d ed.], §§ 517, 520; 1 Parsons' Notes & Bills, 259; Story on Promissory Notes [6th ed.], § 197; Chitty on Bills [8th ed.], 281.)

As the rules of law governing the case are now well settled, we shall refer to but few authorities, and those of recent date in this court. In *Wilson v. Metropolitan El. Ry. Co.* (120 N. Y. 145) it was stated, as a general rule, "that one who receives from an officer of a corporation the notes or securities of such corporation, in payment of, or as security for, a personal debt of such officer, does so at his own peril. *Prima facie* the act is unlawful, and, unless actually authorized, the purchaser will be deemed to have taken them with notice of the rights of the corporation." It was also held in that case that the purchaser of a promissory note, purporting to have been issued by a corporation, who made the purchase under circumstances which devolved upon him the duty of inquiry as to its validity, assumed the risk, by failing to inquire, of proving that the facts he could have discovered, had he made inquiry, would have protected him.

In *Gerard v. McCormick* (130 N. Y. 261) an agent, who had charge of certain premises known as the "Glass Buildings," deposited the rents collected by him to the credit of a bank account kept in his name as "Agent, Glass Buildings." Without authority he gave a check on this account, signed by

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him as "Agent, Glass Buildings," in payment of his own debt. The check was paid, and upon the trial of an action brought five years afterward to recover the amount thereof, there was no evidence of bad faith on the part of the defendant who took the check, except that afforded by the check itself and the nature of the debt. The court held that the form of the check was sufficient to indicate to the defendant the existence of an agency and to put him on inquiry as to the agent's authority to so use the money. In deciding the case the court said: "We think that the form of the signature to the check was sufficient to put the payee on inquiry as to the right of the agent to pay his personal debt out of the fund. The buildings and the bank were both well known, were in the same city and very near to the place where the check was received by the defendant, and had an inquiry been made at the bank or at the buildings, it would have been ascertained that the account was held by William Boswell, not as owner, but as agent for these plaintiffs. In case a person having notice that money or property is held by another in a fiduciary capacity, receives it without inquiry from the agent, in satisfaction of his personal debt, the sum or property so received may be recovered by the true owner unless the agent was authorized to so dispose of it."

In *Cheever v. Pittsburgh, etc., R. R. Co.* (150 N. Y. 59, 67) the paper was regular on its face, and this fact protected the plaintiff, but the court, referring to "a case where an officer of a corporation makes the corporate obligation payable to himself, and then attempts to deal with it for his own benefit," said: "When paper of that character is presented by the officer or agent of the corporation, it bears upon its face sufficient notice of the incapacity of the officer or agent to issue it." (Citing the *Wilson* and *Gerard* cases, *supra*, and also *Hanover Bank v. Am. Dock & T. Co.*, 148 N. Y. 612; *Bank of New York, etc., v. Am. Dock & T. Co.*, 143 N. Y. 559.) In the case at bar the appearances were not deceptive, but suggested the true state of affairs, which worked a fraud on the plaintiff. (See, also, *First National Bank of Paterson v.*

*National Broadway Bank*, 156 N. Y. 459; *Smith v. Weston*, 159 N. Y. 194, 199; *Angle v. North Western, etc., Ins. Co.*, 92 U. S. 330, 342.)

The case of *Dike v. Drexel* (11 App. Div. 77; affirmed without opinion in 155 N. Y. 637), which is relied upon by the defendant, does not conflict with the views herein expressed. According to the facts found in that case a new firm had succeeded an old firm, composed in part of the same members, and with a similar but not identical firm name. The business of the new firm "was apparently the same as and a continuation of that" of the old "and such appearance was a natural result of the conduct and acquiescence of the other members of the new firm, from the formation and during the entire continuance thereof." "In fact the business and assets of the 'old firm' were so mingled with those of 'the new firm' as to establish a practical identity between the two firms." The new firm gave certified checks to be applied upon an indebtedness of the old, which the former had not assumed. Said checks were received "in absolute good faith" and collateral securities were surrendered in consequence thereof. Under these peculiar circumstances it was decided that the receiver of the new firm, which had become insolvent, could not recover the money back. Owing to the intimate connection, if not substantial identity, of the two firms, the Supreme Court held that there was nothing suspicious or unusual in paying a debt of the old firm with a check of the new concern, nor any notice that in so doing the funds of the new partnership were being improperly used. It was natural to assume, under the circumstances, that the new firm had bought out the old, and being indebted to it for the purchase price, had paid a part of the debt in this way through the direction of a member common to both, "to whom," as the trial judge found, "the other three partners confided the unrestricted, absolute and entire control and management of the business, allowing him to conduct it as though it were his own, and in its behalf to incur liabilities and dispose of assets absolutely according to his own judgment." Thus it is obvi-

ous that the managing copartner had implied authority from his associates to use the checks as he did, and that the question of notice was not necessarily involved in the decision.

In the case now before us the question of notice is supreme. The checks, when read in the light of the facts known to the defendant, were notice to him that he was apparently accepting money from one to whom it did not belong, and this cast upon him the duty of inquiring into the matter so as to see whether the facts were in accord with the appearances; for, if they were, he knew that he could not honestly take the checks.

The judgment appealed from should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, LANDON, CULLEN and WERNER, JJ., concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOEL BACON,  
Commissioner of Highways of the Town of Veteran,  
Respondent and Appellant, v. NORTHERN CENTRAL RAIL-  
WAY COMPANY, Appellant and Respondent.

1. RAILROADS—MANDAMUS TO COMPEL RESTORATION OF HIGHWAY UNDER THE RAILROAD LAW—A PROCEEDING INDEPENDENT OF REMEDY FOR ENCROACHMENT GIVEN BY HIGHWAY AND TOWN LAWS AND MAY BE MAINTAINED BY PRIVATE CITIZEN IN THE NAME OF THE PEOPLE. Mandamus will lie at the instance of a private citizen in the name of the People of the state to compel a lessee railroad company, which has reconstructed a crossing in such manner as to encroach upon a highway, to perform the public duty imposed upon it by section 11 of the Railroad Law (L. 1890, ch. 565) of restoring the highway "to its former state or to such state as not to have its usefulness impaired," and the proceeding is entirely independent of the remedy given by the Highway Law (L. 1890, ch. 569) for the removal of encroachments upon a highway, and sections 15 and 105 relating to notice of, and directions for, their removal and providing, in connection with the Town Law (L. 1890, ch. 569, § 182), that the proceeding must be brought in the name of the town, have no application.

2. PARTIES—WAIVER OF DEFECT—DEMURRER—CODE OF CIV. PRO. § 2076. The owner and lessor of the railroad is not a necessary party to the proceeding, and if it were, where the defect of parties appears upon the face of the proceedings and defendant fails to object thereto

by demurrer under section 2076 of the Code of Civil Procedure, it is waived.

3. CHANGE OF LOCATION AND METHOD OF CONSTRUCTION OF RAILROAD CROSSING — NECESSITY FOR ORDER OF SUPREME COURT. Where a railroad company without legal authority has changed its line thirty-five feet to the westward, has crossed the highway at a new point and has constructed a new bridge, the abutments of which encroach upon the highway, instead of being parallel with and on the lines thereof, as the abutments of the old bridge were, it must be treated as an original crossing, which can only be lawfully accomplished by complying with section 11 of the Railroad Law providing that no railroad corporation shall construct its road across, upon or along any highway in a town without an order of the Supreme Court of the district in which such highway is situated, after at least ten days' written notice of intention to make the application for such order shall have been given to the commissioner of highways of the town.

4. WHEN RAILROAD COMPANY MAY NOT CHANGE LINE OF HIGHWAY CROSSED BY ITS TRACK. The provision of section 11 of the Railroad Law, that "when an embankment or cutting shall make a change in the line of such highway \* \* \* desirable with a view to a more easy ascent or descent, it may construct such highway \* \* \* on such new line as its directors may select, and may take additional lands therefor by condemnation if necessary," applies only where the existence of an embankment or cutting makes a change of grade in the highway desirable, and does not apply where the object is merely to change the highway, at a point where it is crossed by an overhead track, so that it shall approach the underpass formed by the abutments perpendicularly and not obliquely, and, therefore, obviate the necessity of changing the abutments so that they shall not encroach upon the highway; nor does the further provision, to the effect that where a railroad crosses a highway the company shall restore it "to its former state or to such a state as not to have unnecessarily impaired its usefulness," and the highway may be carried under or over the track, confer any power to change its line or to acquire additional lands.

5. POWER OF COURT TO AUTHORIZE CONTINUANCE OF ABUTMENTS ENCROACHING UPON HIGHWAY. The court has no power in a proceeding by mandamus to compel a railroad company to restore a highway at the point of an overhead crossing to such condition as will not impair its usefulness, to make permanent an encroachment of stone abutments upon a highway, provided the route of the highway is changed by acquiring additional land, so that the traveler may pass in safety over a straight course between the abutments, where their construction in that manner was without an order of the Supreme Court, as required by section 11 of the Railroad Law, and was, therefore, illegal *ab initio*.

*People ex rel. Bacon v. N. C. Ry. Co.*, 35 App. Div. 624. modified.

(Argued June 19, 1900; decided October 2, 1900.)



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Statement of case.

CROSS-APPEALS from an order of the Appellate Division of the Supreme Court in the third judicial department, entered December 5, 1898, affirming an order of Special Term directing that a peremptory writ of mandamus issue commanding the Northern Central Railway Company to restore a highway in the town of Veteran, Chemung county, where that company's railroad crosses it, to such condition as will not impair its usefulness, by changing the abutments of said crossing so that they shall run parallel with the highway or by purchasing sufficient land so as to lay out the highway in the manner directed, as to details, by the court.

The relator appeals from so much of the order as directs the purchase of land and the laying out of the highway as stated. The defendant appeals from the entire order.

The railroad in question was built in 1849 and crosses the highway above grade. It extends from Williamsport, Pa., to Elmira, N. Y., and thence in a northerly direction to Canandaigua. The highway thus crossed is the main thoroughfare between Elmira and Watkins, and travel thereon is very heavy.

In the summer of 1895 the railway track was moved some thirty-five feet to the westward, and a new bridge was constructed over the highway.

From 1849 to 1895, upon the south of the highway, at the point where the railroad then crossed it, was constructed a solid stone abutment parallel with, and upon its south line, and on the northerly side a framed timber abutment was built upon a stone foundation also parallel with the highway and with the southern abutment. This old bridge was what is called a "skew" bridge, that is, its cross beams ran parallel with the highway and at a right angle with the line of the railroad.

When the track was moved to the westward in 1895, a new bridge was constructed in a different location. A solid stone abutment was laid on the south side of the highway at right angles with the line of the railroad and was so located that the eastern extremity encroached eight feet on the traveled or beaten part of the highway. This abutment was about thirty-eight feet in length, and from the eastern end extended

a solid wing of stone for the distance of thirty-five feet. Parallel with this southern abutment and at right angles with the line of the railroad, the northern abutment was constructed of solid stone and so placed that its western extremity encroached eight feet five inches on the traveled or beaten part of the highway. Its length was about thirty-eight feet, and from its western extremity a wing of solid stone extended in a northwesterly direction for a distance of thirty-five feet. The highway is three rods wide.

Since the year 1886 the railroad has been in the possession of, and operated by, the defendant company.

The changes in the line of the road and location of bridge, as described, were made by the defendant.

*Frederick Collin* for plaintiff, respondent and appellant. The verdict of the jury settled the fact that the existing construction of the railroad crossing unnecessarily impaired the usefulness of the highway. (*People ex rel. v. Kearney*, 44 App. Div. 449; *People ex rel. v. Lyman*, 46 App. Div. 312.) Land once taken and appropriated to a public use, pursuant to law, under the right of eminent domain, cannot, under general laws and without special authority from the legislature, be appropriated to a different public use. (*P. P. & C. I. R. Co. v. Williamson*, 91 N. Y. 552; *People ex rel. v. N. Y. C. & H. R. R. R. Co.*, 156 N. Y. 570; *D., L. & W. R. R. Co. v. City of Buffalo*, 158 N. Y. 266.) The placing of these abutments within the beaten and traveled portion of this highway, even were it true that the crossing was legally located, was illegal and cannot be legalized by the court. (*Jones v. R. R. Co.*, 169 Penn. St. 333; *D., L. & W. R. R. Co. v. City of Buffalo*, 158 N. Y. 266; *Township v. P. R. R. R. Co.*, 49 N. J. Eq. 11; 3 Elliott on Railroads, §§ 1099, 1105, 1109; Pierce on Railroads, 242, 243, 244, 245; *R. R. Co. v. Comrs.*, 31 Ohio St. 338; Elliott on Roads & Streets, 599; *Fenwick v. E. L. Ry. Co.*, L. R. [20 Eq. Cas.] 544; *Buchholz v. N. Y., L. E. & W. R. R. Co.*, 148 N. Y. 640; *W. R. R. Co. v. State*, 29 N. J. L. 353.)

The crossing cannot be removed as an obstruction, but the railroad company may be required to perform its duty of restoring the highway. It is not necessary or proper that the commissioners of highways should proceed under section 105 of the Highway Law. (*Town of Windsor v. D. & H. C. Co.*, 92 Hun, 127; *Allen v. B., R. & P. R. Co.*, 151 N. Y. 434; 3 Elliott on Railroads, § 1105.) The duty to restore is a public duty. The acts of constructing the crossing and restoring the highway are acts in which the public are interested. (*People v. N. Y. C. & H. R. R. R. Co.*, 74 N. Y. 302; *Conklin v. N. Y., O. & W. R. Co.*, 102 N. Y. 107; *People ex rel. v. D. & C. R. R. Co.*, 58 N. Y. 152; *People ex rel. v. B. & A. R. R. Co.*, 70 N. Y. 569; *People ex rel. v. R. & S. L. R. Co.*, 14 Hun, 371; *People ex rel. v. T. & B. R. Co.*, 37 How. Pr. 427; *People v. C. & A. R. R. Co.*, 67 Ill. 118; *State ex rel. v. R. R. Co.*, 86 Mo. 13.) The relator had the right to apply for the writ. The proceeding may be maintained by any citizen. (*Chittenden v. Wurster*, 152 N. Y. 345; *People v. Guggenheimer*, 47 App. Div. 9; *Baird v. Supervisors*, 138 N. Y. 95; *People ex rel. v. Bd. Suprs.*, 56 N. Y. 249; *People ex rel. v. Daley*, 37 Hun, 461; *U. P. R. R. Co. v. U. S.*, 91 U. S. 343; High's Ex. Leg. Rem. § 431; *People ex rel. v. Van Wyck*, 27 Misc. Rep. 439; *People ex rel. v. N. Y. S. W. Co.*, 38 App. Div. 413; *People ex rel. v. Manning*, 37 App. Div. 141; *Village v. People*, 78 Ill. 382.) The court did not err in directing a verdict for plaintiff. (Code Civ. Pro. §§ 2083, 2084; *People ex rel. v. Ord. Am. Star*, 21 J. & S. 66; *People ex rel. v. Kearney*, 44 App. Div. 449; *People v. N. Y. C. & H. R. R. R. Co.*, 74 N. Y. 302; *D., L. & W. R. R. Co. v. City of Buffalo*, 65 Hun, 464; *Town v. D. & H. C. Co.*, 92 Hun, 127; *Roberts v. C. & N. W. Ry. Co.*, 35 Wis. 679; *Veazie v. P. Ry. Co.*, 49 Me. 119; *E. & T. H. Ry. Co. v. Carvener*, 113 Ind. 51; *Post v. W. S. R. R. Co.*, 123 N. Y. 580.)

*George M. Diven* for defendant, appellant and respondent.  
Mandamus will not lie where there is an adequate remedy by

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law. (*People ex rel. v. Crennan*, 141 N. Y. 239; *People ex rel. v. Campbell*, 72 N. Y. 496; *People ex rel. v. Thompson*, 96 N. Y. 611; *People v. Mead*, 24 N. Y. 144; *McCullough v. Mayor, etc.*, 23 Wend. 460; *People ex rel. v. Green*, 2 T. & C. 62; *People ex rel. v. Brown*, 55 N. Y. 180; *People ex rel. v. Comptroller*, 77 N. Y. 45; *McMahon v. S. A. R. R. Co.*, 75 N. Y. 231.) The court, in awarding the peremptory writ of mandamus, may mold it according to the just rights of all the parties. (Code Civ. Pro. §§ 2067, 2090; *People v. Nostrand*, 46 N. Y. 375; *People ex rel. v. D. & C. R. R. Co.*, 58 N. Y. 152; *People ex rel. v. Wilson*, 119 N. Y. 515; *People ex rel. v. Bd. of Police*, 35 Barb. 644; *People ex rel. v. Batchellor*, 58 N. Y. 128; *People ex rel. v. Woodman*, 16 N. Y. S. R. 715.) The discretion of the court in granting the alternative order was properly exercised. (*People ex rel. v. D. & C. R. R. Co.*, 58 N. Y. 153; *People ex rel. v. Board of Education of N. Y.*, 158 N. Y. 125; *Husted v. Van Ness*, 158 N. Y. 104; *Jacobus v. Van Wyck*, 157 N. Y. 495; *People ex rel. v. Lord*, 157 N. Y. 408.)

BARTLETT, J. The trial judge directed the jury to find a verdict that the defendant had unnecessarily, by the construction of the crossing, impaired the usefulness of the highway.

On this verdict an order was entered directing that a peremptory writ of mandamus issue, commanding, in substance, the defendant to restore the highway, at the point of crossing, to such condition as will not impair its usefulness by changing the abutments of the bridge so that they shall run parallel with the highway, or, by purchasing lands, change the course of the highway according to a map to which reference is made.

As this crossing was originally constructed, a traveler upon the highway, approaching from either direction, had a clear view between the abutments of the bridge.

At the new crossing this view was greatly impaired, and from some standpoints destroyed. The result was danger of

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collisions between teams approaching each other from opposite directions. The record discloses a number of such accidents.

The trial judge, in his opinion, after having visited the *locus in quo*, by consent of the parties, states: "I took with me, at my own expense, a surveyor, who was in no way connected with either party to this suit. A map has been by him prepared which shows the existing line of the road and the highway, and also shows in red lines a changed or proposed highway, which would approach this underpass directly and not at an angle. \* \* \* I am convinced that this highway can be substantially restored only by the changing of the abutments of the underpass so that they shall run parallel with the road, or by the changing of the highway so that it shall approach the underpass perpendicularly and not obliquely. After very careful attention and consideration given to the arguments upon both sides, and the claims of the respective parties, I am further convinced that the statute will be complied with by the adoption of either of said methods."

The Appellate Division affirmed, without opinion, the order directing the peremptory writ of mandamus to issue. Cross-appeals have been taken from the order of affirmance.

The relator insists that while it was proper for the trial court to order the abutments of the new bridge to be changed so as to run parallel with the highway, it had no jurisdiction, in this proceeding, to change the course of the highway in the manner indicated, which allows the encroachments to remain therein permanently.

The defendant appeals from the entire order, insisting, *first*, that its preliminary motion to quash or dismiss the alternative writ should have been granted; *second*, that the order should be reversed on the merits and on exceptions taken at the trial. The learned counsel for defendant stated, on the argument, that if this court affirmed the order of the Appellate Division he waived the motion to quash, but if the order was to be modified so as to compel the defendant to place the bridge abutment parallel with the highway, the motion was to stand.

As we have reached the conclusion that the trial court was without power to change the highway as indicated, we will first consider the motion to quash the alternative writ. Four grounds are relied upon in support of the motion.

The first and third grounds are to the effect that the affidavit on which the alternative writ was granted is defective, in that it fails to show that the defendant had not been served with a notice by the commissioner of highways, as required by the Highway Law (§ 105), stating that an obstruction or an encroachment had been placed in the highway, specifying the location thereof and directing the defendant to remove the same within a specified time. Also, that the proceeding is not brought in the name of the town of Veteran, as provided by sections 15 and 105 of the Highway Law and section 182 of the Town Law.

It is a sufficient answer to these grounds of motion to point out that while towns may compel the removal of obstructions of and encroachments upon the highway under the provisions of law above cited, the proceeding at bar is entirely independent of that remedy, and is based upon certain provisions of the Railroad Law that will be referred to in detail later when considering this appeal on the merits. The relator, as a private citizen, instituted this proceeding in the name of the People, for the public benefit.

The second ground is based on the well-settled rule that mandamus will not lie where there is an adequate remedy at law.

The defendant rested under the public duty as provided by the Railroad Law (§ 11) to restore the highway "to its former state, or to such state as not to have unnecessarily impaired its usefulness."

In this proceeding the defendant is charged to be in violation of that duty, and its performance is properly sought to be enforced by the peremptory writ of mandamus.

When a railroad crosses one of the highways of the state, as in this instance, where travel, both for pleasure and on business, is very heavy, the People are directly interested in

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the enforcement of the legislative command that the usefulness of the highway shall not be unnecessarily impaired. (*Allen v. Buffalo, Rochester & P. Ry. Co.*, 151 N. Y. 434; *People v. N. Y. C. & H. R. R. Co.*, 74 N. Y. 302.)

The last ground in support of the motion is to the effect that the Elmira & Lake Ontario Railroad Company, mentioned in the affidavit on which the alternative writ was granted, as the owner of the railroad in question, was a necessary party to this proceeding.

It is conceded that the defendant, under contracts with the corporation referred to, has been in full possession and control of the railroad, operating the same since 1886, furnishing all the necessary rolling stock for the purpose. It is also conceded that the defendant constructed the bridge and crossing of which complaint is made. The corporation that erected the encroachment in the highway can be compelled to remove it. The contract relations existing between the defendant and the Elmira & Lake Ontario Railroad Company are unimportant. The People may deal with the corporation found in full possession and operation of the railroad.

The defendant has also waived this alleged defect of parties.

The affidavit on which the alternative writ was issued, sets forth the ownership of the road by the Elmira & Lake Ontario Railroad Company and its lease or contract with the defendant. The defect of parties, if any existed, appeared on the face of the proceedings, and objection should have been taken by demurrer. The Code of Civil Procedure provides that a demurrer may be taken in a mandamus proceeding in a case where a defendant may demur to a complaint (§ 2076), so that the general provisions as to demurrer apply (§ 488, sub. 6).

The motion to quash, or dismiss, the alternative writ was properly denied.

In discussing the case on the merits we will first consider the appeal of the relator. It is urged by the relator that the order appealed from permits the crossing of the highway by defendant's railroad to be located thirty-five feet westerly of its original line, and allows the defendant to construct or con-

tinue within the traveled portion of the highway, substantial stone abutments permanent in their nature.

It is undisputed that the defendant changed its line thirty-five feet to the westward and crossed the highway at a new point and in a different manner without legal authority.

An informal talk with the highway commissioner of the town of Veteran, who had no authority in the premises, and who disputes the greater part of the conversation, was without effect, if considered proved as testified to by defendant's witnesses.

The Railroad Law (§ 11), among other things, provides that no railroad corporation shall construct its road "across, upon or along any highway in any town or street in any incorporated village, without the order of the Supreme Court of the district in which such highway or street is situated, made at a Special Term thereof, after at least ten days' written notice of the intention to make application for such order shall have been given to the commissioners of highways of such town, or board of trustees of the village in which said street or highway is situated."

We are of opinion that this change of location and the point and method of crossing the highway cannot be regarded as a rebuilding of the old bridge, but is to be treated as an original crossing, which could only be accomplished by complying with the statute just quoted. If two permanent stone abutments were to be projected into the traveled portion of the highway, one from either side, encroaching eight feet or more, the town authorities were entitled to their day in court under this statute.

When a railroad company relies upon a legislative act as justification for the occupation of a public highway, with its piers and abutments, it must show that the statute authorized in express terms, or by clear and unquestionable implication, the doing of the very acts complained of, or that the statute was imperative and could not be executed without causing a nuisance. (*D., L. & W. R. R. Co. v. City of Buffalo*, 158 N. Y. 266, 273.)



The defendant proceeded without warrant of law, and its structure was a public nuisance in the highway.

This is necessarily recognized as the situation by the trial court, when it directed the defendant to place its abutments parallel with the highway, or leave them therein, but change the course of the highway so as to reduce the danger of accident by a direct approach rather than at an angle.

The trial court had no authority to continue these encroachments on the highway, as both the act and method of crossing were illegal.

The defendant's argument assumes that it was in the proper exercise of its legal rights when crossing the highway at the point where the new bridge was erected, and, resting on that assumption, seeks to justify the portion of the order which allows the obstructions to remain in the highway subject to a change of route of the latter. It is argued by defendant that a bridge with cross beams at right angles with the line of the railroad is safer and "better railroading" than a "skew bridge," and justifies the placing of two abutments that encroach upon the highway eight feet or more each.

It is also argued that notwithstanding this encroachment the highway was restored "to its former state, or to such state as not to have unnecessarily impaired its usefulness," as the statute requires.

The defendant's civil engineer, under cross-examination, admitted that a "skew bridge" could be made safe, but that it was more expensive. This was shown in the proofs to be due to the fact that the cross beams are longer, running at an angle, and consequently have to be heavier.

The proposed change in the route of the highway is claimed by the defendant to be authorized by both statute and authority.

The statute relied upon is the Railroad Law (§ 11), which provides, in part, as follows: "Every railroad corporation which shall build its road along, across or upon any \* \* \* highway \* \* \* which the route of its road shall intersect or touch, shall restore the \* \* \* highway \* \* \*"

thus intersected or touched, to its former state, or to such state as not to have unnecessarily impaired its usefulness, and any such highway \* \* \* may be carried by it, under or over its track as may be found most expedient.

“Where an embankment or cutting shall make a change in the line of such highway \* \* \* desirable, with a view to a more easy ascent or descent, it may construct such highway \* \* \* on such new line as its directors may select, and may take additional lands therefor by condemnation if necessary.”

This last provision quoted, providing for taking additional lands, is confined to the situation where the existence of an embankment or cutting makes a change of grade in the highway desirable. This court so held in a recent case. (*Buchholz v. N. Y., L. Erie & Western R. R. Co.*, 148 N. Y. 640.) Chief Judge ANDREWS, in referring to this provision (p. 644), said: “The provision last cited is the only one in the act which authorizes a railroad company to change the line of a highway, and, without considering whether the authority conferred by this provision may be exercised independently of the local authorities having the charge of highways, it is sufficient to say that the provision has no application in this case. The change in Main street was not and could not have been made under the authority of this provision, since no embankment or cutting existed at the grade crossing.”

This provision is equally inapplicable to the case before us, as no change of the highway grade was involved.

It, therefore, follows that if there is any justification for this change in the route of the highway and taking additional land therefor, it must be found in the provision of section 11 first above cited. This is in brief a provision that where a railroad crosses a highway the company shall restore it “to its former state, or to such a state as not to have unnecessarily impaired its usefulness,” and the highway may be carried under or over the track.

There is no suggestion here of a power to change the route of the highway or to acquire additional lands. There is,

therefore, no statutory authority for the change of route and the condemnation of land for the purpose.

Passing to the question of authority, the defendant cites *People ex rel. Green v. D. & C. R. R. Co.* (58 N. Y. 152) as in point. In that case the track of the company ran along and upon the highway.

At page 164 Judge FOLGER says: "Railroad companies are authorized to construct their tracks *along* or *upon* any highway which the route thereof shall intersect or touch.

"They are required to restore the highway to its former state, or to such state as not unnecessarily to have impaired its usefulness (Laws of 1850, chap. 140, p. 22, § 24).

"It is manifest that if the track is laid along or upon the highway, it must itself be removed away from the track, or its usefulness will be impaired. \* \* \*

"It may be that the removal or change cannot be made without the taking of other lands on to which it shall be removed. Hence the acquisition of that land is required for the purposes of the incorporation of the company (Id. § 13, p. 215); and is necessary for the construction, maintenance and accommodation of its railroad (Id. § 28, sub. 3, p. 224)."

It thus appears that, in the case cited, the railroad track ran along and upon the highway; that the removal of the highway a proper distance from the track was essential if its usefulness was not to be unnecessarily impaired; that the land taken was for the purposes of the incorporation, and was necessary for the construction of the railroad. The case has no application to the one before us.

The defendant is met at the threshold of this case with the fact that the removal of the railroad track thirty-five feet to the westward, and the crossing of the highway at another point, and by a different method of constructing the abutments and bridge, was without application to the court, under the statute already cited, and illegal *ab initio*.

If the defendant could make the change, to which reference has been made, without the order of the court, it might have just as well removed its route and crossing thirty-five hundred

feet to the westward instead of thirty-five feet, if it had served its purpose so to do.

The attitude of the People as to this point seems to be that of insisting upon it unless the relief is limited to placing the bridge abutment parallel with the highway.

We thus reach the vital question whether it is competent for the court, in this proceeding, the highway commissioner of the town of Veteran having been deprived of his day in court, as accorded him by statute, to make permanent an encroachment of stone abutments upon the highway of sixteen feet five inches in the aggregate, provided the route of the highway is changed by acquiring additional land so that the traveler may pass in safety, over a straight course, between these projecting points of stone.

These encroaching abutments are illegal, a public nuisance, and the trial court was without power to perpetuate them. We have been pointed to no statute or case authorizing the action of the court below.

The defendant should be compelled to place its bridge abutments parallel with the highway, as they existed at another location from 1849 to 1895.

The defendant, in further support of its appeal, insists that errors were committed upon the trial which require a reversal of the order:

(1) That the court erred in instructing the jury to find a verdict that the construction erected by the defendant had unnecessarily impaired the usefulness of the highway.

A perusal of the record satisfies us that the encroachment on the highway is practically undisputed, is a public nuisance, and that a verdict to the contrary would be set aside as against the evidence.

(2) That the court erred as to certain rulings on questions of evidence.

We have examined all the exceptions taken on the trial and find no reversible error.

(3) That the court below exercised its discretion in directing the manner in which the defendant should perform its duty.

We hold that the modification of the order of the trial court is made necessary by reason of legal errors duly presented by the record, and no review is attempted of the discretion of the court below.

The order of the trial court should be modified by striking therefrom the words, "or by purchasing sufficient land so as to lay out the highway as indicated upon the defendant's map, Exhibit 'A' of December 31st, 1897, upon which map the parallel red lines indicate the locations in which the said railway company must construct stone walls not to exceed three feet in height, or some barrier of like height."

The order of the Appellate Division is modified so as to conform to the above modification of the order of the trial court. As so modified, both of said orders are affirmed, with costs to the relator.

PARKER, Ch. J., VANN, CULLEN and WERNER, JJ., concur ; O'BRIEN, J., not voting ; LANDON, J., not sitting.

Ordered accordingly.

WILLIAM D. STROBEL et al., Appellants, Impleaded with  
Others, v. THE KERR SALT COMPANY, Respondent.

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165	187
8165	617

1. RIPARIAN RIGHTS — GENERAL RULES NOT RELAXED IN FAVOR OF GREAT INDUSTRIES. The doctrine that relaxes the ordinary rules governing the rights of riparian owners in favor of great industries engaged in the development of the natural resources of the country has never been adopted by the Court of Appeals of this state, and no public necessity exists therefor.

2. GENERAL RULES — CO-RELATIVE RIGHTS OF RIPARIAN OWNERS. In the absence of modification by grant or prescription, a riparian owner is entitled to a reasonable use of the water flowing by his premises in a natural stream, as an incident to his ownership of the soil, and to have it transmitted to him without sensible alteration in quality or unreasonable diminution in quantity. While he does not own the running water, he has the right to a reasonable use of it as it passes by his land. As all other owners upon the same stream have the same right, the right of no one is absolute, but is qualified by the right of the others to have the stream substantially preserved in its natural size, flow and purity, and to protection against material diversion or pollution. This is the common

right of all, which must not be interfered with by any. The use by each must, therefore, be consistent with the rights of the others, and the maxim of *sic utere tuo* observed by all. The rule of the ancient common law is still in force—*aqua currit et debet currere, ut currere solebat*.

8. **LAWFUL USES OF STREAM.** Consumption by watering cattle, temporary detention by dams in order to run machinery, irrigation when not out of proportion to the size of the stream, and some other familiar uses, although in fact a diversion of the water involving some loss, are not regarded as an unlawful diversion, but are allowed as a necessary incident to the use in order to effect the highest average benefit to all the riparian owners. As the enjoyment of each must be according to his opportunity and the upper owner has the first chance, the lower owners must submit to such loss as is caused by reasonable use.

4. **REASONABLE USE DEPENDS UPON CIRCUMSTANCES.** Surrounding circumstances, such as the size and velocity of the stream, the usage of the country, the extent of the injury, convenience in doing business and the indispensable public necessity of cities and villages for drainage, are also taken into consideration, so that a use which, under certain circumstances, is held reasonable, under different circumstances would be held unreasonable. It is also material, sometimes, to ascertain which party first erected his works and began to appropriate the water.

5. **UNREASONABLE USE IS A QUESTION OF LAW.** The question of reasonable use is generally a question of fact, but whether the undisputed facts and the necessary inferences therefrom establish an unreasonable use is a question of law.

6. **FACTS ESTABLISHING UNREASONABLE USE.** When the diversion, or pollution, which is treated as a form of diversion, is caused by a new and extraordinary method of using the water, hitherto unknown to the state, and such method not only permanently diverts a large quantity of water from the stream, but also renders the rest so salt at times that cattle will not drink it unless forced to by necessity, fish are destroyed in great numbers, vegetation is killed and machinery rusted, such use as a matter of law is unreasonable and entitles the lower riparian owner to relief.

7. **POWER OF COURT OF EQUITY TO RESTRAIN UNREASONABLE USE.** Where the natural and necessary result of the place selected and the method adopted by an upper riparian owner in the conduct of his business is to cause material injury to the property of an owner below, a court of equity will exercise its power to restrain on account of the inadequacy of the remedy at law and in order to prevent a multiplicity of suits. The lower riparian owners are entitled to a fair participation in the use of the water and their rights cannot be cut down by the convenience or necessity of the business of an upper riparian owner.

8. **GREAT INDUSTRIES LOCATED ON NATURAL STREAMS NOT PERMITTED TO INFLICT SUBSTANTIAL INJURY UPON LOWER RIPARIAN PROPERTY.** While the courts will not overlook the needs of important manufacturing interests, nor hamper them for trifling causes, they will not permit sub-

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Statement of case.

stantial injury to neighboring property, with a small but long-established business, for the purpose of enabling a new and great industry to flourish. They will not change the law relating to the ownership and use of property in order to accommodate a great business enterprise. According to the old and familiar rule, every man must so use his own property as not to injure that of his neighbor, and the fact that he has invested much money and employs many men in carrying on a lawful and useful business upon his own land, does not change the rule, nor permit him to permanently prevent a material portion of the water of a natural stream from flowing over the land of a lower riparian owner, or to so pollute the rest of the stream as to render it unfit for ordinary use.

9. WHEN COURT OF EQUITY WILL ENJOIN UNREASONABLE USE OF NATURAL STREAM. Where one riparian proprietor by his use causes a deterioration of the water of a natural stream, the fact that others are using it in the same manner instead of preventing relief may require it, and even if the damages are slight, where the act complained of is such that by its repetition or continuance it may become the foundation or evidence of an adverse right, a court of equity will interpose by injunction.

10. PARTIES — WHEN RIPARIAN OWNERS MAY UNITE IN ACTION TO RESTRAIN UNREASONABLE USE. Different riparian owners of distinct parcels of riparian land, who have a common grievance for an injury of the same kind, inflicted at the same time and by the same acts, though the injury differs in degree as to each owner, may unite in a common action to enjoin a higher riparian owner from diverting or polluting the stream.

11. PERMANENT INJUNCTION MAY BE REFUSED CONDITIONALLY BY A COURT OF EQUITY. A court of equity may require, as a condition of withholding a permanent injunction restraining an upper riparian proprietor from diverting or polluting the waters of a natural stream by using it in a new or peculiar manner for the manufacture of salt, the construction of a reservoir on the upper sources of the stream to accumulate water when it is plentiful for use in time of scarcity, and thus neutralize the diminution caused by the manufacture of salt, and may also require on the like condition greater care in preventing the escape of salt water and salt substances into the stream, and thus prevent or minimize the pollution.

*Strobel v. Kerr Salt Co.*, 24 App. Div. 626, reversed.

(Argued June 19, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 21, 1898, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

This action was commenced in 1892 by fourteen plaintiffs who own various mills on Oatka creek, a natural stream run-

ning through the counties of Wyoming, Genesee and Monroe, against the defendant, a domestic corporation engaged in the manufacture of salt at a point on said creek above the mills of the plaintiffs, to restrain it from diverting or polluting the waters thereof. The action is for an injunction only, as the plaintiffs in their complaint expressly reserve "to themselves and each of them their several damages \* \* \* which they will seek to recover in several actions at law in due time to be prosecuted for that purpose." In its answer the defendant denied that it had diverted or polluted the water of the stream, except that in carrying on the business of manufacturing salt upon its own premises, it had made a reasonable use of a small portion of said water, and alleged that such use was necessary and lawful.

Upon the trial in 1893 it appeared that Oatka creek formerly contained pure water, which was valuable for various purposes, and especially for use in manufacturing. The plaintiffs and their predecessors in title have owned mills and manufactories situated upon said stream from one and one-half to thirty miles below the salt works of the defendant, and have operated them by the water thereof for many years, one at least since 1825. While they still depend mainly upon water power to run their machinery, some of them are now using steam to a certain extent. There is less water in the stream at present than there was a few years ago, and the plaintiffs attribute the deficiency mainly to the diversion of water by the salt works of the defendant and others, recently erected, while the defendant insists that it is owing to the clearing away of forests and the drainage of swamps. The evidence does not show any material change in the forests of the valley during the past ten or fifteen years, but it appears that streams in western New York have generally lessened in size during the past twenty-five or thirty years.

Since 1886 the defendant has carried on the business of manufacturing salt at a point upon said stream above the mills of the plaintiffs. The watershed above its works comprises about fourteen square miles, and that below about one hun-



dred and forty. Its plant consists of 250 acres of land lying upon the creek, with extensive buildings, machinery and appliances for the manufacture of salt. It has sunk seven wells upon its premises, each about 2,000 feet deep, at the bottom of which rock salt is found in two beds, which vary in depth from 30 to 60 feet. The salt is not mined, but water is pumped from a reservoir fed by a race from Oatka creek, forced down one pipe to the bed of salt, where it speedily becomes saturated, and thence in the form of brine is forced by hydraulic pressure up another pipe into storage tanks upon the surface of the ground. It is then drawn by gravity through a system of pipes into shallow pans and grainers, which are widely spread over the land of the defendant, where it is evaporated by exposure to the air and by means of steam and artificial heat. The function of the water is to bring the salt to the surface in solution, where it is first purified by the use of lime and then evaporated, leaving a residuum of salt suitable for domestic purposes. All the water that is forced down into the earth and up again must be turned into vapor before the solid salt can be extracted therefrom. The water taken by the defendant for this purpose and for use in its boilers to run the necessary machinery is about 20,000 cubic feet, or 150,000 gallons a day, which is more than 104 gallons per minute, and is about four per cent of the flow of the stream in low water at the mills of the plaintiffs nearest the defendant's works. The part totally consumed in the boilers is very slight, as the steam is condensed into water by artificial means and used over again.

The leakage from the salt after it is removed from the evaporating pans falls upon the surface of the ground, and scales, which are a combination of lime and salt formed during the process of manufacture, are thrown from the grainers and pans upon the land of the defendant, all of which is within the drainage area of the Oatka. Much of this refuse, mixed with ashes, was used to fill up low places about the buildings so as to protect them in high water.

The stream is small, but no complaint is made of any defi-

ciency in the supply of water except during the dry season of the year, when the plaintiffs have less than they need to operate their mills, and less than they had before the erection of the defendant's works. The waters of the creek have become so salt as at times to be unfit for watering cattle as well as for many other uses both domestic and mechanical. The effect has been to destroy the most of the fish and certain kinds of vegetation growing in the stream or upon the margin.

There are twelve other salt works, somewhat widely separated, situated upon said creek below those of the defendant, which are operated in the same way and contribute their quota of diminution and pollution. The drainage from several villages also affects the purity of the water, especially when the stream is low. Salt is the leading industry of the Oatka valley, and only one company actually mines by means of shafts sunk to the beds of salt. The salt so mined is dark, impure and unfit for ordinary uses, unless it is dissolved, purified and the water evaporated. The amount made daily by the defendant is about 860 barrels of pure white merchantable salt, but the full capacity of its works is nearly 1,200 barrels. It furnishes employment to more than one hundred men and women. The capacity of the other salt manufactories, not including the one which mines its salt in bulk, is about 9,800 barrels daily. It requires 13.35 cubic feet of brine, of the usual strength, or more than 100 gallons, to make a barrel of salt. The effect of taking 150,000 gallons of water from the stream without restoring any part of it, or making any allowance for evaporation, would deprive the plaintiffs of 3 8-10 horse power during an entire day of twenty-four hours, or more than 9 horse power for a working day of ten hours, assuming that the water when not in use is saved by means of dams. If the production by the other works involves a proportionate use of the water, the number of horse power taken away would be increased accordingly. Salt water rusts machinery, deranges the operation of boilers and requires the frequent replacement of pipes

cocks, etc., although it is used generally in steam vessels on the high seas.

Upon the trial, which took place about seven years after the defendant had established its plant, the conflict in the testimony was mainly confined to the degree of diminution and pollution. The amount of diminution depends largely upon the alleged return of the water to the stream after it had been converted into vapor and allowed to escape in the air. The amount of pollution depends largely upon when the samples of water, which were analyzed by chemists, were taken from the stream, as those taken in high water contained a small amount of salt when compared with those taken during low water.

The trial court found among other facts that "the configuration of the ground on either side of the stream is such that the water or vapor escaping from said boilers or grainers as it condenses into water naturally returns to the same stream. \* \* \* That in the process of manufacturing salt, some water containing salt in solution has flowed by such natural drainage from said works into said stream; that since the beginning of this action the defendant has constructed a trench between its works and the said stream so located and constructed as to carry any water containing salt in solution that might escape by drainage from defendant's works into its said salt wells; that it has not been shown that defendant diverts the water of the stream or that it makes any other use of it except in the mining and manufacture of salt on its own lands as hereinbefore set forth; or that it has caused or permitted the escape of foreign substances into said stream except by the natural drainage from its own lands as aforesaid. The use of the waters of said creek, made as aforesaid by the defendant, is a proper and necessary use of the same upon its said premises in the transaction of its said business, and is a reasonable use thereof, such as it was lawfully entitled to make and not prejudicial to the rights of the plaintiffs."

It was found as a conclusion of law that the plaintiffs were not entitled to any part of the relief demanded in their com-

plaint, which was dismissed upon the merits, with costs. Upon appeal to the Appellate Division the judgment entered accordingly was affirmed without an opinion, except that one of the justices who dissented wrote elaborately in favor of reversal. Seven only of the plaintiffs have appealed to this court.

*Henry Selden Bacon* for appellants. The refusal of the trial court to find that the amount of water diverted, or threatened to be diverted by the defendant, and prevented from reaching the stream again by evaporation, is about 20,000 cubic feet, or 150,000 gallons per day, was error. (*Hudson v. R., W. & O. R. R. Co.*, 145 N. Y. 408; *Matter of Harriott*, 145 N. Y. 540.) The acts admitted by the defendant amount in law to a diversion, in the technical sense, and the question of reasonable use does not arise. (*Parker v. Griswold*, 17 Conn. 288; *Garwood v. N. Y. C. & H. R. R. Co.*, 83 N. Y. 400.) Whether the acts complained of amount to a diversion or not, the use made is in law not reasonable. (*Clinton v. Myers*, 46 N. Y. 511; *Barnard v. Shirley*, 135 Ind. 547; *C., etc., Co. v. Tucker*, 48 Ohio St. 41; *Beach v. S. I. & Z. Co.*, 54 N. J. Eq. 65; *Young v. B. D. Co.*, L. R. [App. Cas. 1893] 691; *Mann v. Retsof Co.*, 49 App. Div. 454; *Prentice v. Geiger*, 74 N. Y. 341; *Canfield v. Andrew*, 54 Vt. 1; *Snow v. Parsons*, 28 Vt. 559; *Jacobs v. Allard*, 42 Vt. 403.) The exceptions to rulings upon evidence present reversible error. (High on Injunctions, § 16; Kerr on Injunctions, 4-7; Angell on Watercourses, § 449; *Corning v. T. I. & N. Factory*, 40 N. Y. 191; *Davis v. Lamberton*, 56 Barb. 480; *Garwood v. N. Y. C. R. R. Co.*, 83 N. Y. 400; *Goldsmid v. Comrs.*, L. R. [1 Eq.] 160; *W. & B. Nav. Co. v. S. W. W. Co.*, L. R. [9 Ch. App.] 451.) The custom of salt manufacturers to pollute the stream can have no effect to protect one of them in such injury to his neighbors. (*Smith v. Wright*, 1 Caines, 43, 45; *Columbus Co. v. Tucker*, 48 Ohio St. 41.)

*Norris Morey* for respondent. An owner of land has the right to work, develop and improve his own real property,

and to produce and market its natural products, whether mineral or otherwise, and to allow drainage and refuse therefrom to pass into the natural watercourses pertaining thereto. (*Booth v. R., W. & O. T. R. R. Co.*, 140 N. Y. 276; *French v. Vix*, 143 N. Y. 90; *Negus v. Becker*, 143 N. Y. 303; *McCormick v. Horan*, 81 N. Y. 90; *P. C. Co. v. Sanderson*, 113 Penn. St. 126; *Peck v. Goodberlett*, 109 N. Y. 180; *Waffle v. N. Y. C. R. R. Co.*, 54 Barb. 89; *W. C. I. Co. v. Kenyon*, L. R. [6 Ch. Div.] 773.) Every owner of land upon a running stream has a right, incident to his ownership of land, to make a reasonable use of the water of such a stream, upon and in connection with his land. (Cooley on Torts, 582, 584; *Prentice v. Geiger*, 74 N. Y. 341; *Gould v. B. D. Co.*, 13 Gray, 443; *Bullard v. S. V. M. Co.*, 77 N. Y. 525; *Townsend v. Bell*, 53 N. Y. S. R. 614; 70 Hun, 557; *Thomas v. Brackney*, 17 Barb. 654; Angell on Watercourses [Perkins' ed.], 117-119, 140; Gould on Waters, §§ 208, 217, 220; *Snow v. Parsons*, 28 Vt. 459; *Holden v. Lake Co.*, 53 N. H. 552; *K. & W. Mfg. Co. v. U. Mfg. Co.*, 39 Conn. 576; *Hetrich v. Deachler*, 6 Penn. St. 32; *P. C. Co. v. Sanderson*, 113 Penn. St. 126.) The reasonable use of a stream by one proprietor may be to the injury or detriment of another proprietor, and the advantage which the upper owner has over the one below him, by reason of his position above upon the stream rather than below, is one to which each of the lower riparian owners are necessarily subject. (*Bullard v. S. V. Mfg. Co.*, 77 N. Y. 527; *Palmer v. Mulligan*, 3 Caines, 308; *Gould v. B. D. Co.*, 13 Gray, 442; *Prentice v. Geiger*, 74 N. Y. 341; Gould on Waters [2d ed.], § 220; *Merrifield v. Worcester*, 110 Mass. 221; *Hayes v. Waldron*, 44 N. H. 585; *Townsend v. Bell*, 70 Hun, 557; *Snow v. Parsons*, 28 Vt. 459; *Sanderson v. P. C. Co.*, 113 Penn. St. 126, 146; *K., etc., Mfg. Co. v. U. Mfg. Co.*, 39 Conn. 576.) The facts proved and found in this case do not show an unlawful diversion of the stream or of a part thereof. (Gould on Waters, § 213; *Garwood v. N. Y. C. & H. R. R. Co.*, 83 N. Y. 400; *Smith v. City of Rochester*, 92

N. Y. 463; *N. Y. R. Co. v. Rothery*, 132 N. Y. 293; *Parker v. Griswold*, 17 Conn. 288.) The question as to whether the use made by a riparian owner of the waters of the stream upon his own riparian lands has been a reasonable one, is a question of fact. (*Prentice v. Geiger*, 74 N. Y. 341; *Bullard v. S. V. M. Co.*, 77 N. Y. 525; Gould on Waters, § 220; *Dumont v. Kellogg*, 29 Mich. 420; *Hayes v. Waldron*, 44 N. H. 585; *Merrifield v. Worcester*, 110 Mass. 221; *Thomas v. Brackney*, 17 Barb. 654; *Townsend v. Bell*, 70 Hun, 557; *P. C. Co. v. Sanderson*, 113 Penn. St. 126; Cooley on Torts, 582; *Timm v. Bear*, 29 Wis. 254; *Gould v. B. D. Co.*, 13 Gray, 443.) This action to obtain an adjudication that the use made by defendant of its riparian property is an unreasonable use, and to obtain a permanent injunction against such use, cannot be maintained either on behalf of the fourteen original plaintiffs or on behalf of the seven appellants. (*Reid v. Gifford*, Hopk. Ch. 416; *Emery v. Erskine*, 66 Barb. 9; *Demarest v. Hardham*, 34 N. J. Eq. 469; *Hudson v. Maddison*, 12 Sim. 416; *Gray v. Rothschild*, 112 N. Y. 668.)

VANN, J. As the findings of the trial court are general and somewhat indefinite, construction is necessary by reading them in the light both of the uncontradicted evidence and of the evidence most favorable to the defendant. When, for instance, the learned trial judge found no diversion of the water and no use of it *except* in making salt upon the defendant's own lands, he did not find that there was no diversion or pollution, and if he had it would have been an error of law, because opposed to the uncontradicted evidence, and open to review by us because the affirmance was not unanimous. So, when he found that the use of the water by the defendant was proper, necessary and reasonable, and such as it was lawfully entitled to make and not prejudicial to the rights of the plaintiffs, it was to some extent a conclusion of law, and, in so far as it was a finding of fact, so general as to require construction through the aid of other facts, either found or uncontra-

dicted. The same is true of the finding that the defendant has not unlawfully diverted or polluted the waters of said stream to the injury or prejudice of the plaintiffs, for as there was manifestly some diversion and some pollution, with some injury and some prejudice, the finding is either against the uncontradicted evidence or simply reflects the opinion of the trial judge that the degree of diminution, pollution and injury was not so substantial as to require action by a court of equity. While the trial judge found that owing to the hills bounding the valley the vapor caused by evaporating salt on so large a scale, "as it condenses into water naturally returns to said stream," he did not and could not find that it all so returned, or state the proportion that escaped. It was impossible for any witness to testify what part of the vapor rising in a narrow valley about two miles wide from summit to summit with comparatively low hills on either side, was carried away and dissipated by the wind, and what part returned to the earth, within the limits of the valley, in the form of mist or rain. The witnesses could not tell from observation, nor state as a fact, where such an invisible, elastic and elusive substance went. There was no evidence of an increase in the rain or moisture. In cold weather, when the water is high, condensation would be rapid, but in warm weather, when the water is scarce, condensation would be slow. Some of the settling tanks are on the hillside, half a mile from the stream. The measurements made below the works included the return by condensation, and there was no evidence to justify the conclusion that all the water diverted reached the stream again. (*Hudson v. Rome, W. & O. R. R. Co.*, 145 N. Y. 408, 412.) The counsel for the defendant states in his points that "it is a very moderate estimate to say that at least two-thirds of the escaping steam, on the average, must be condensed and returned to the water supply of Oatka Creek."

The theory upon which the trial judge proceeded to judgment is illustrated in his opinion where he says, "the question is whether it is a reasonable use of the stream to allow the water impregnated with salt to take its natural course into the

stream, impairing its use for drinking purposes, or otherwise affecting its use by the lower proprietors to their injury?" Discussing the question he further said, "since the salt is a component part of the soil itself, and the owner has a legal right to excavate it and place it upon the surface, it would be an unwarrantable stretch of the powers of a court of equity to compel its removal, merely upon the ground that the surface water, becoming impregnated with the salt, and taking its natural course into a stream, renders its waters unsuitable for drinking purposes, or causes injury to the boilers and machinery of a mill situated far down on the banks of the stream. \* \* \* The defendant, as a riparian owner, has a right to the natural and necessary drainage of any salt water which may escape from the salt works into the stream. The water used was returned to the stream in as clear and pure a condition as the nature of the operations upon the lands would permit. The only obligation resting upon the defendant is to exercise ordinary care so as not to inflict unnecessary injury to the lower proprietors."

Referring to the case of *Barnard v. Sherley* (135 Ind. 547), which followed the *Sanderson* case, hereinafter alluded to, he quoted with apparent approval the following therefrom: "Where a work is lawful in itself, and cannot be carried on elsewhere than where nature located it, or where public necessity requires it to be, then those liable to receive injury from it have a right only to demand that it shall be conducted with all due care, so as to give as little annoyance as may be reasonably expected; and any injury that may result, notwithstanding such care in the management of the work, must be borne without compensation. It is then a case in which the interest and convenience of the individual must give way to the general good."

Thus the trial judge was of the opinion that the plaintiffs, although they and their predecessors had used the waters of the stream in their mills and on their farms for half a century, could not prevent the defendant, which long afterward and with knowledge of the facts established its plant, from devoting



the stream to a new and unusual use, diverting the water and turning "a fresh water stream into a salt water stream." This would amount to a virtual confiscation of the property of small owners in the interest of a strong combination of capital.

The use made by the defendant of the water of the stream is new and peculiar, for it involves its utter destruction as water. Until it is turned into vapor it refuses to give up its salt, so that it must cease to be water or fail to accomplish the defendant's purpose. That purpose is to utilize only by destroying, not in a scientific sense of course, but in a practical sense. The loss is not incidental by diminution through the process of using the water, as in most cases presented to the courts, but is absolute by means of dissipation through the atmosphere. The diversion is as complete as if the water had been pumped over the hills bordering the Oatka valley and turned into another creek, for diversion, as applied to water-courses, means taking water from a stream and not returning it, so that the lower riparian owner can use it. (*Parker v. Griswold*, 17 Conn. 288, 289.) By taking nearly 150 gallons every minute during a working day of ten hours, the defendant diverted that quantity of water from its natural course. The evidence, practically undisputed, shows that the water of the stream, which was fresh before the erection of the defendant's works, is now salt, especially in a dry time. The witnesses who tested it agree that it "tastes salt," and the effect of salt in the water was obvious to the senses in various ways, as by small stalactites of salt formed at leaky spots in the pipes of machinery, the formation of visible crystals on stones in the stream, the rusting of machinery, the foaming of water in the boilers and the destruction of vegetation. The owners of portable steam engines, who formerly used the water in their boilers, abandoned it and resorted to rain or well water. Wells near the stream were affected to some extent. In some places the salt killed vegetation, including willow trees; it destroyed fish in large numbers; cattle and horses refused to drink the water, although some drank it when they had noth-

ing else to drink. One of the plaintiffs boiled three quarts of water taken from the race leading to his mill and obtained nearly a tablespoonful of salt; another could grind only about half as much grain as he had previously ground at the same season of the year.

All this evidence and other of like character stands substantially uncontradicted, as it is not a contradiction for a witness to say that he did not observe these effects, when he did not examine in order to see what the facts were. The only dispute was in relation to the degree of pollution, and the defendant's evidence is substantially adopted for the purpose of this review. One of its experts, who for twenty years was the state chemist at the Onondaga Salt Springs, testified that in a sample taken in December, 1892, above the works, he found in a gallon of water .086 grains of salt, while a specimen taken right below the works contained 305.01 grains. A specimen taken at the mill of the plaintiff Munger, which is a mile and one-half below the defendant's works, and is above all the other salt plants, afforded 99.08 grains, one from the mill of the plaintiff Martin, about two miles below, 75.69, another from Brown's pond, still farther down the stream, 82.14. These samples were taken by the chemist himself, and, except that last mentioned, were unaffected by any other source of pollution than the defendant's works. Thirty-three other specimens, obtained in April, 1893, still further down the stream, after many small rivulets, as well as the drainage from other salt works, had emptied in, but not taken by the chemist himself, showed much less salt to the gallon, and averaged between 30 and 40 grains, only two of them exceeding 50. An analysis made by the plaintiffs' chemist of forty-four specimens, taken by a hydraulic engineer in September, October and November, 1892, at points from one-half to one mile apart, all along the stream below defendant's works, showed a much larger proportion of salt, averaging, even after rejecting eleven of the highest, which went up into the thousands, from 100 to 300 grains to the gallon. The samples of the plaintiffs were taken from the stream after the com-

mencement of the action and before the trial, while the defendant's were taken shortly before or during the trial and after the changes had been made in order to prevent the salt water from reaching the creek. While all water contains some salt, that which contains less than 50 grains to the gallon is, according to the testimony of defendant's expert, suitable for use in steam boilers. Brine of full strength contains 18,072 grains to the gallon.

The testimony as to the amount of diminution is less definite and satisfactory than that relating to pollution, owing to the difficulty of measuring water flowing in a stream. It is undisputed, however, that the water diverted, as measured by defendant's expert, by "four independent but simultaneous methods," including "weir measurement," which embraced all water returned to the stream, if used by the plaintiffs to the best possible advantage, would be equal to nine horse power daily. One year it amounted to four per cent of the flow at plaintiff Munger's mill during the whole month of July. The uncontradicted evidence and the evidence most favorable to the defendant shows such a degree of pollution, and such an amount of diminution, as to make it certain, in our judgment, that the trial judge in his findings meant that neither was in excess of what the defendant had a lawful right to put in or take out of the stream in conducting a lawful business upon its own premises. This theory is confirmed by his opinion, as he relies largely upon a case in Pennsylvania, which held that one operating a coal mine in the ordinary and usual manner may, upon his own lands, drain or pump the water that percolates into his mine into a stream which forms the natural drainage basin in which the mine is situate, although the quantity of water may thereby be increased and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian owners. (*Pennsylvania Coal Company v. Sanderson*, 113 Pa. St. 126.) That case had a varied history and it was not until it came before the court for the fourth time that, influenced by the necessities of a great industry, the rule was laid down as stated. The case was first considered in

1878, when the claim of the lower riparian owner was sustained upon the principle of *sic utere tuo, ut alienum non lœdas*. In reply to the argument of counsel that "the law must be adjusted to our great industrial interests" the court said: "In the argument here the ground was distinctly taken that immense public and private interests demand that the right which the defendants exercised in ejecting the water from their mine should have recognition and be established. It was said that in more than a thousand collieries in the anthracite regions of the state the mining of coal can only be carried on by pumping out the percolating water which accumulates in every tunnel, slope and shaft, and which, when brought to the surface, must find its way by a natural flow to some surface stream. It was urged that the law should be adjusted to the exigencies of the great industrial interests of the Commonwealth and that the production of an indispensable mineral, reaching to the annual extent of twenty millions of tons, should not be crippled and endangered by adopting a rule that would make colliers answerable in damages for corrupting a stream into which mine water would naturally run. \* \* \* The consequences that would flow from the adoption of the doctrine contended for could be readily foretold. Relaxation of legal liabilities and remission of legal duties to meet the current needs of great business organizations, in one direction, would logically be followed by the same relaxation and remission, on the same grounds, in all other directions. One invasion of individual right would follow another, and it might be only a question of time, when, under the operations of even a single colliery, a whole country side would be depopulated." In 1880 the case was reviewed a second time and it was again urged that the rights of the riparian owners should yield to the immense public interest involved. The court, however, reaffirmed its former decision, and among other things said: "The mining operations of the defendant do not involve the public welfare, but are conducted solely for the purposes of private gain. Incidentally, all lawful industries result in the general good; they are, however, not the less instituted and

conducted for private gain, and are used and enjoyed as private rights over which the public has no control. It follows that none of them, however important, can justly claim the right to take and use the property of the citizen without compensation." (*Pennsylvania Coal Co. v. Sanderson*, 94 Penn. St. 302, 307.) In 1883 the court heard the case for the third time, with the same result, but on the last review in 1886, by a vote of four to three, it reversed its previous decisions and held that "the use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners, who purchased their land, built their houses and laid out their grounds before the opening of the coal mine, the acidulated waters from which rendered the stream entirely useless for domestic purposes, must *ex necessitate* give way to the interests of the community in order to permit the development of the natural resources of the country and to make possible the prosecution of the lawful business of mining coal." The extensive coal mines of the state of Pennsylvania were regarded as of sufficient importance to warrant the court in departing from the law as previously laid down by itself in the same case, as well as from the rule which prevails in England and in this country, except in some of the states where mining is extensively carried on and there is no way to get rid of the water in the mines except by pumping it into the streams. (*Clifton Iron Co. v. Dye*, 87 Ala. 470.) Courts of the highest standing have refused to follow the *Sanderson* case (*Columbus, etc., Co. v. Tucker*, 48 Ohio St. 41; *Beach v. Sterling Iron & Zinc Co.*, 54 N. J. Eq. 65; *Young v. Bankier Dist. Co.*, L. R. [App. Cas. 1893] 691); and its doctrine was finally limited by the court which announced it. (*Robb v. Carnegie*, 145 Pa. St. 338.) The court below, however, manifestly followed the Pennsylvania rule without limitation. (*Mann v. Retsof Mining Co.*, 49 App. Div. 454, 459.) We have never adopted that rule in this state and no public necessity exists therefor, even if it would ever warrant the courts in relaxing rules for the protection of property of small value in the interest of some business required to develop the resources of the state,

and in which much capital had embarked, giving employment to a great number of people.

. There is nothing about the case now before us to take it out of the general rules governing the rights of riparian owners. Those rules are well established in this state, and, so far as material to the case before us, are, in the absence of modification by grant or prescription, as follows: A riparian owner is entitled to a reasonable use of the water flowing by his premises in a natural stream, as an incident to his ownership of the soil, and to have it transmitted to him without sensible alteration in quality or unreasonable diminution in quantity. While he does not own the running water, he has the right to a reasonable use of it as it passes by his land. As all other owners upon the same stream have the same right, the right of no one is absolute, but is qualified by the right of the others to have the stream substantially preserved in its natural size, flow and purity, and to protection against material diversion or pollution. This is the common right of all, which must not be interfered with by any. The use by each must, therefore, be consistent with the rights of the others, and the maxim of *sic utere tuo* observed by all. The rule of the ancient common law is still in force; *aqua currit et debet currere, ut currere solebat*. Consumption by watering cattle, temporary detention by dams in order to run machinery, irrigation when not out of proportion to the size of the stream, and some other familiar uses, although in fact a diversion of the water involving some loss, are not regarded as an unlawful diversion, but are allowed as a necessary incident to the use in order to effect the highest average benefit to all the riparian owners. As the enjoyment of each must be according to his opportunity and the upper owner has the first chance, the lower owners must submit to such loss as is caused by reasonable use. Surrounding circumstances, such as the size and velocity of the stream, the usage of the country, the extent of the injury, convenience in doing business and the indispensable public necessity of cities and villages for drainage, are also taken into consideration, so that a use which, under certain

circumstances, is held reasonable, under different circumstances would be held unreasonable. It is also material, sometimes, to ascertain which party first erected his works and began to appropriate the water. (*Clinton v. Myers*, 46 N. Y. 511; *N. Y. Rubber Co. v. Rothery*, 132 N. Y. 293; *Smith v. City of Brooklyn*, 160 N. Y. 357; *Prentice v. Geiger*, 74 N. Y. 341; *Bullard v. Saratoga V. Mfg. Co.*, 77 N. Y. 525; *Merritt v. Brinkerhoff*, 17 Johns. 306; *Crooker v. Bragg*, 10 Wend. 260; *Arnold v. Foot*, 12 Wend. 330; *Tyler v. Wilkinson*, 4 Mason, 397; *Columbus, etc., Coal Company v. Tucker*, 48 Ohio, 41; *Beach v. Sterling Iron & Zinc Co.*, 54 N. J. Eq. 65; *St. Helens Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Crossley v. Lightowler*, L. R. [3 Eq. Cas.] 279; L. R. [2 Ch. App.] 478; *Pennington v. Brinsop Hall Coal Co.*, L. R. [5 Ch. Div.] 769; *Attorney-General v. Lunatic Asylum*, L. R. [4 Ch. App.] 146; *Hodgkinson v. Ennor*, 4 Best & Smith, 229; 3 Kent's Com. 439; Gould on Waters, § 219; Higg Pol. Waterc. 132; Washburn on Easements [4th ed.], 215; 1 Wood on Nuisances, §§ 364, 427.)

The question of reasonable use is generally a question of fact, but whether the undisputed facts, and the necessary inferences therefrom, establish an unreasonable use is a question of law. When the diversion, or pollution, which is treated as a form of diversion, is caused by a new and extraordinary method of using the water, hitherto unknown in the state, and such method not only permanently diverts a large quantity of water from the stream, but also renders the rest so salt, at times, that cattle will not drink it unless forced to by necessity, fish are destroyed in great numbers, vegetation is killed and machinery rusted, such use as a matter of law is unreasonable and entitles the lower riparian owner to relief. Where the natural and necessary result of the place selected, and the method adopted by an upper riparian owner in the conduct of his business is to cause material injury to the property of an owner below, a court of equity will exercise its power to restrain on account of the inadequacy of the remedy at law and in order to prevent a multiplicity of suits. The

lower riparian owners are entitled to a fair participation in the use of the water and their rights cannot be cut down by the convenience or necessity of the defendant's business. "The necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both." (*Wheatley v. Chrisman*, 24 Pa. St. 298.) While the courts will not overlook the needs of important manufacturing interests, nor hamper them for trifling causes, they will not permit substantial injury to neighboring property, with a small but long-established business, for the purpose of enabling a new and great industry to flourish. They will not change the law relating to the ownership and use of property in order to accommodate a great business enterprise. According to the old and familiar rule every man must so use his own property as not to injure that of his neighbor, and the fact that he has invested much money and employs many men in carrying on a lawful and useful business upon his own land, does not change the rule, nor permit him to permanently prevent a material portion of the water of a natural stream from flowing over the land of a lower riparian owner, or to so pollute the rest of the stream as to render it unfit for ordinary use.

The fact that other salt manufacturers are doing the same thing as the defendant, instead of preventing relief may require it. "Where there is a large number of persons mining on a small stream, if each should deteriorate the water a little, although the injury from the act of one might be small, the combined result of the acts of all might render the water utterly unfit for further use; and if each could successfully defend an action on the ground that his act alone did not materially affect the water, the prior appropriator might be deprived of its use, and at the same time be without a remedy." (*Hill v. Smith*, 32 Cal. 166; *Woodyear v. Schaefer*, 40 Am. Rep. 419; *Sherman v. Fall River Iron Works Co.*, 87 Mass. 213; *Mayor, etc., v. Warren Manufacturing Company*, 59 Md. 96; *Crossley v. Lightowler*, L. R. [3 Eq. Cas.] 279; 2 Ch. App. Cas. 478; *Pennington v. Brinsop Hall Coal Co.*, L. R. [5 Ch. Div.] 769, 772.)



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N. Y. Rep.] Opinion of the Court, per VANN, J.

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In *Garwood v. N. Y. C. & H. R. R. Co.* (116 N. Y. 649) the diversion, as shown by the record on file in this court, was less than that testified to by the defendant's witnesses in the case before us. Even if the damages are slight, where the act complained of is such that by its repetition or continuance it may become the foundation or evidence of an adverse right, a court of equity will interpose by injunction. (*Amsterdam Knitting Company v. Dean*, 162 N. Y. 278, 280.)

The objection that the plaintiffs have no cause of action common to all, and hence that they cannot sue jointly, is unsound. While each owns a distinct piece of land situated upon a part of the stream separate from that abutted upon by the land of every other owner, they all have a common grievance against the defendant for an injury of the same kind, inflicted at the same time and by the same acts. The common injury, although differing in degree as to each owner, makes a common interest and warrants a common remedy. (*Emery v. Erskine*, 66 Barb. 9, 14; *Reid v. Gifford*, Hopkins' Ch. 416, 477; *Murray v. Hay*, 1 Barb. Ch. 59, 62; *Blunt v. Hay*, 4 Sand. Ch. 362.)

It does not follow from these views that, if upon another trial the facts are unchanged, the defendant and the other salt manufacturers will be compelled to make such terms as they can, for a court of equity, with its plastic powers, can require, as a condition of withholding a permanent injunction, the construction of a reservoir on the upper sources of the stream, to accumulate water when it is plentiful for use in times of scarcity, and thus neutralize the diminution caused by the manufacture of salt. That court may also require, on the like condition, greater care in preventing the escape of salt water and salt substances into the stream, as the defendant attempted to do during the trial, and thus prevent or minimize the pollution.

The judgment of the courts below should be reversed and a new trial granted, with costs to abide the event.

PARKER, Ch. J., O'BRIEN, BARTLETT, LONDON, CULLEN and WERNER, JJ., concur.

Judgment reversed, etc.

LOUIS LOWENSTEIN, Appellant, v. LOMBARD, AYRES & COMPANY,  
Respondent.

1. APPEAL — ASSUMPTION AS TO THEORY OF RECOVERY. Where a plaintiff seeks to recover upon one of two theories, and the amount of the verdict depends upon which theory the jury finds to be in accord with the facts, their verdict for the plaintiff in one of the amounts is to be taken as establishing the theory which would entitle the plaintiff to that amount, and the questions to be decided upon appeal are those which depend upon that assumption.

2. PRINCIPAL AND AGENT — APPARENT AUTHORITY. A common carrier which is an undisclosed principal and holds out a person as its agent, to whom shippers may apply for rates of freight, thereby clothes him with apparent authority to include in a contract for shipment a provision, usual among carriers at the agent's port, for insurance against all loss without a declaration of the value of the goods although the agent had no authority to make the contract without such declaration, when the shipper has no notice of such limitation upon his authority.

3. NOTICE OF LIMITATION UPON AGENT'S AUTHORITY. Where two persons are held out as agents by an undisclosed common principal in language applying equally to both, the fact that one is an agent at the place where the carrier's main office is located while the other is at a distant and smaller place, is not sufficient to operate as a notice to shippers at the smaller place that the latter agent is subordinate to the former.

4. CARRIER'S CIRCULAR — WHEN NOT NOTICE. A statement on the carrier's circular, "insurance free when valuation declared before the sailing of the steamers," is not notice to an intending shipper that an agent appointed by it to make contracts for shipment has authority to insure only when the value of the shipment is so declared, since the announcement therein is not to be considered as the measure of the agent's authority in the absence of an express statement to that effect, but only as a general rule promulgated by the agent, which does not restrict him from departing from it in a special case.

5. EVIDENCE — SIMILAR CONTRACTS BY AGENT. In an action against the carrier where the defense is that its agent had no authority to make the contract without requiring a declaration of the value of the goods, evidence that the agent had made contracts with other parties, dispensing with such declaration, before and at the time of the alleged contract with plaintiff, is admissible as direct evidence for the purpose of defining the contract as actually made.

6. WHEN ORAL NEGOTIATIONS ARE NOT MERGED IN WRITTEN INSTRUMENT. Where a contract for shipment is made by an intending consignee with the carrier's agent in one place, and his consignor at another place, pursuant to the consignee's instructions, ships the goods at such other

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place, the bill of lading given by the carrier to the consignor at the latter place does not constitute the contract between the carrier and consignee, and the rule that oral negotiations are merged in the written instrument has no application.

*Lowenstein v. Lombard, Ayres & Co.*, 17 App. Div. 408, reversed.

(Argued June 18, 1900; decided October 2, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, made May 7, 1897, reversing a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Horace E. Deming* for appellant. Middleton's powers as agent were co-extensive with the business and duties committed to his care. (*Goldwater v. L., L. & G. Ins. Co.*, 39 Hun, 176; 109 N. Y. 618.) Middleton as the local agent of a transportation company could make contracts binding upon the company even in direct contravention of the rules and instructions of the company. (*Pickford v. G. J. R. Co.*, 12 M. & W. 766; *Goodrich v. Thompson*, 44 N. Y. 324; *I'ruitt v. H. & S. J. R. Co.*, 62 Mo. 527; *Deming v. G. T. R. Co.*, 48 N. H. 455; *Harrison v. M. P. R. Co.*, 74 Mo. 364; *Cross v. Graves*, 4 Tex. App. Cas. 100, 101.) Middleton's apparent authority being sufficient and complete, there was nothing in the testimony which could lead the plaintiff to suspect that his actual authority was limited or even to put the plaintiff upon inquiry. (*Hopkins v. Clark*, 7 App. Div. 207; *McNichol v. P. E. Co.*, 12 Mo. App. 401; *Barreda v. Pilsbee*, 21 How. [U. S.] 146; *Pearsall v. W. U. Tel. Co.*, 124 N. Y. 256.) Mere notice to the shipper of limitations is not sufficient; the assent of the shipper to the limitations must be shown. (*Pearsall v. W. U. T. Co.*, 124 N. Y. 256; *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, 19 Wend. 251; *Clark v. Faxton*, 21 Wend. 153; *C., etc., T. Co. v. Belknap*, 21 Wend. 354; *Blossom v. Dodd*, 43 N. Y. 264; *Coupland v. H. R.*

*R. Co.*, 61 Conn. 531; *Dixon v. W. U. T. Co.*, 3 App. Div. 60; *Gott v. Dinsmore*, 11 Mass. 45.) Testimony that under the line's usual contract the freight rate included insurance without previous declaration of value is relevant and material. (*Morrison v. Davis*, 20 Penn. St. 171; *Norris v. Fowler*, 87 N. C. 9; *N. W. Co. v. N. A. Co.*, 156 Mass. 331; *Buckley v. D. F. Co.*, 2 Conn. 252; *Lyon v. George*, 44 Md. 295; *L. & E. R. Co. v. Lyons*, 46 S. W. Rep. 209; Greenl. on Ev. [16th ed.] 59, § 14; *Outwater v. Nelson*, 20 Barb. 29; *Wiglesworth v. Dallison*, 1 Smith's L. C. 405.)

*Henry W. Goodrich* for respondent. The trial court erred in the admission of the evidence of other shippers. (*Bunten v. O. M. Ins. Co.*, 4 Bosw. 254; *Duryea v. Vosburgh*, 121 N. Y. 57; *Hollingham v. Head*, 4 C. B. [N. S.] 388; *Tallman v. Kimball*, 74 Hun, 279; *People v. Rector, etc.*, 19 Wend. 569; *Kirkpatrick v. N. Y. C. R. R. Co.*, 79 N. Y. 240; *Plato v. Reynolds*, 27 N. Y. 586; *Carpenter v. Ward*, 30 N. Y. 243; *Schell v. Plumb*, 55 N. Y. 592, 600; *Gandolfo v. Appleton*, 40 N. Y. 533.) Whether an agent be a general or special agent is immaterial where it appears that the person dealing with the agent had notice of the limitation imposed upon the agent's power. (2 Kent's Comm. [13th ed.] 620; *Mussey v. Beecher*, 3 Cush. 511; *Walsh v. H. F. Ins. Co.*, 73 N. Y. 5; *Chaffe v. Stubbs*, 37 La. Ann. 656; *Smith v. Tracy*, 36 N. Y. 79; *Bickford v. Menier*, 107 N. Y. 490; *Marvin v. U. L. Ins. Co.*, 85 N. Y. 278; *Freeman v. Buckingham*, 18 How. [U. S.] 182; *G. C. & S. F. Ry. Co. v. Brown*, 24 S. W. Rep. 918; *Stringham v. S. N. Ins. Co.*, 4 Abb. Ct. App. Dec. 315; *Grant v. Norway*, 10 C. B. 665.)

CULLEN, J. This action was brought by the plaintiff, as survivor of the firm of Wollner & Lowenstein, to recover the value of certain merchandise shipped from New York on the steamer *Vidette*, which was lost at sea. In the year 1887 the defendant was operating as a common carrier of goods and persons a line of steamships, which included the *Vidette*,

between the cities of New York and Mobile. The defendant's principal business was the refining of petroleum, and the primary purpose of the maintenance of its steamship line was the transportation of its own lumber and staves from the South to New York. The steamships were run and operated under the name of "New York and Mobile Steamship Company," or "New York and Mobile Steamship Line." The connection of the defendant with the line was in no way advertised or made known to the public. All the bills of lading, receipts and blank stationery used in connection with the business merely bore one of the two names above recited, and underneath such title the words, "Agents, William J. Best, 12 Broadway, New York; Robert Middleton, Mobile, Alabama." There was some difference in the various forms in their references to the agencies of the line. Some of the circulars and blanks issued at New York contained only the statement that Best was the agent in New York, without referring to Middleton's position in Mobile. Others gave both Best and Middleton as agents. The advertisement of the line in Mobile mentioned the agency of Middleton in Mobile first, and then the agency of Best in New York. On other papers the name of Best seems to have generally preceded that of Middleton, but there was nothing in advertisements, circulars, bills of lading or other forms to show that the rank and authority of Best and Middleton were not the same. The plaintiff sought to recover on two distinct grounds. The first was an oral agreement made in Mobile with the defendant's agent Middleton, whereby the defendant, in consideration of the freight money, agreed to insure the merchandise shipped against all loss or damage during transit to the amount of the invoice price, with ten per cent added. The second count was for breach of the contract of transportation, in that the steamer was unseaworthy. The defendant answered, admitting the shipment of the goods, but denying the contract of insurance, and also alleging that the goods were lost by peril of the sea, without fault on its part. The case was submitted to the jury on both issues, the contract of

insurance and the unseaworthiness of the vessel, with instructions that if the jury found for the plaintiff on the first issue the verdict should be for the invoice price of the goods, with ten per cent added; while if they found for the plaintiff on the second issue only, there should be deducted from such sum the amount of the freight money. The jury rendered a verdict for the plaintiff for the full amount. The defendant moved for a new trial, which motion was denied. On appeal the Appellate Division reversed the judgment and order, and granted a new trial "upon questions of law only, the court having examined the facts and found no error therein."

From the amount of the verdict, the learned court below assumed, we think correctly, that the plaintiff's recovery was based on the contract for insurance. It reversed the judgment on the ground that Middleton had no power to bind the defendant by the alleged contract of insurance, and because of the admission of improper evidence. As to the actual authority of Middleton, the evidence showed that he was appointed agent in Mobile by one Havens, the secretary of the defendant, who had a general supervision of the line and that he was subject to the instructions of the New York agent, Best, who managed and directed the details of the business. It appeared that Middleton was authorized to insure goods shipped, but only when the value of the goods was declared before the sailing of the steamer. In this case the value of the goods was not declared, the contention of the plaintiff being that under the contract with Middleton he was not required to declare it. It must be conceded, therefore, that under the proof Middleton was not authorized to make the contract sued upon. But if he in fact made that contract the liability of the defendant depends, not on the actual authority of Middleton, but on his apparent authority on which the plaintiff was entitled to rely in dealing with him.

Middleton was not the universal agent or *alter ego* of the defendant, but as to the business confided to him he was a general agent. The circulars and notices directed persons interested to "for rates of freight or passage apply to R. Mid-

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dleton, agent, Mobile; W. J. Best, agent, No. 12 Broadway, New York." The general rule is, "where an entire business is placed under the management of an agent, the authority of the agent may be presumed to be commensurate with the necessities of the situation." (Huffcut on Agency, p. 112, sec. 107.) "The powers of the agent are, *prima facie*, co-extensive with the business entrusted to his care and will not be narrowed by limitations not communicated to the person with whom he deals." (*Ins. Co. v. Wilkinson*, 13 Wallace, 222; approved, *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 207.) The evidence shows that the other transportation lines doing business between Mobile and New York gave free insurance without requiring declaration of value to shippers of freight over those lines and had done so for a long period. "Where the principal confers upon his agent an authority of a kind, or empowers him to transact business of a nature, in reference to which there is a well-defined and publicly known usage, it is the presumption of law, in the absence of anything to indicate a contrary intent, that the authority was conferred in contemplation of the usage, and third persons, therefore, who deal with the agent in good faith and in the exercise of reasonable prudence, will be protected against limitations upon the usual authority, of which they had no notice." (Meechem on Agency, sec. 281.) In *Ellis v. Albany City Fire Insurance Company* (50 N. Y. 402) it was said: "The question in this case is whether this authorized McCoy to make a contract binding upon the defendant for the issue of a policy of insurance. In determining this question the prevailing usage of transacting such business must be regarded, as it is an elementary principle that the delegation of an authority to transact any business includes an authority to transact it in the usual way, and to do the acts usual in its accomplishment." Speaking of the authority of a baggage master of a railroad company, Judge ANDREWS said in *Isaacson v. N. Y. C. & H. R. R. Co.* (94 N. Y. 278): "But the authority of an agent may be implied in many cases from his official designation, the position in which he is placed, and the duties which

naturally appertain thereto. Parties may deal with the agents of corporations upon the presumption that they possess the powers usually assigned to the office they hold, and the principal is bound as to third persons acting in good faith, by the act of an agent within his apparent authority, although in the particular instance it was unauthorized." (See, also, *Talcott v. Wabash R. R. Co.*, 159 N. Y. 461; *Trimble v. N. Y. C. & H. R. R. Co.*, 162 N. Y. 84.) The implied authority of an agent in the absence of notice to the contrary is the measure of his apparent authority. It is clear that in Mobile (if not generally, of which there is no evidence to the contrary), where the agent was to transact his business, stipulations as to insurance were part of the ordinary terms for the shipment of freight. In addition to this Middleton was expressly authorized to grant insurance subject to the qualification that the value of the goods should be declared in advance. We think, therefore, that Middleton had the apparent power to make the agreement sued upon unless the plaintiff had notice of limitation placed on that authority by the principal.

We do not know that the proposition last asserted is gained either by the court below or by the learned counsel for the respondent; but it is contended that the plaintiff was notified that Middleton could only insure when the value of the shipment was declared. This presents the real question which arises in this branch of the case. It appears that on the circulars issued by the line there was printed the statement, "Insurance free when valuation declared before the sailing of steamer." A similar statement appeared on the printed slips which contained the dates of the sailing of the steamers and in the advertisement published in the Mobile papers "Insurance effected on open policy of line before sailing of steamer free." The plaintiff denies having seen these slips, though it seems one of them was inclosed in a letter from his bookkeeper to the firm in Boston who shipped the goods lost. If we assume, however, that the plaintiff had seen these circulars, did they notify him of any limitation on the power of Middleton to



contract for insurance? We think not. It is here that the form of the notices, bills of lading and advertisements becomes very material. As already stated, the connection of the defendant with this line or steamship company, and that it was the principal of whom Best and Middleton were the agents, was not known to the public. The defendant was an undisclosed principal. As far as the public were aware, Middleton and Best had equal authority and no superior was named. Because New York is a very great city and Mobile a comparatively small city, there was no presumption that Best was the superior of Middleton nor that in New York was the home office of the owners of the line in preference to Mobile. In case of question as to Middleton's authority there was no superior given of whom inquiry could be made as to its extent. The notice that insurance was free when the value of the goods was declared before sailing was signed either by Best as agent, or by Best and Middleton as agents. The fair import of this notice was not that the principals had limited the authority of either Middleton or Best in the matter of insurance, but that it was a rule formulated or promulgated by the agents themselves under their authority as agents as the terms on which they sought business. Being such, it was apparently as much within the power of the agent to dispense with it as it was to have formulated it in the first instance. The notice seems to us in all respects similar to a notice that goods will not be received after a specified hour on the day when the ship is to sail, or that merchandise will be carried only when packed in a prescribed manner. These provisions all relate to the details of the business presumably fixed by the agent for its conduct, not by the principal as a limitation of the power of the agent. Steamship companies as a practice advertise their rates of fare, but it is well known that, especially in dull times, abatements in price are made. Indeed, it was recently argued in this court, in support of the validity of a statute forbidding the sale of railroad tickets except by specially authorized agents, that without such a law it was impossible to keep railroad companies from

cutting the rates of fare agreed upon with competing lines. (*People ex rel. Tyroler v. Warden of Prison*, 157 N. Y. 116.) The case is in no respect analogous to that of an insurance policy in which are found express provisions that agents are not authorized to modify its terms except by indorsements in writing. Had the notice in this case been issued by the defendant itself or been signed by Best as general manager, it might be argued that the local agents were not authorized to alter its terms; but since, so far as the notice is concerned, the regulation seems to have emanated only from Best and Middleton as agents or Best alone, of whom Middleton was apparently the equal, parties dealing with them were justified in assuming that Middleton or Best might at any time dispense with the condition prescribed in the notice. This case differs materially from that of *Leinkauf v. Lombard, Ayres & Co.* (12 App. Div. 302). It appears by the report of that case that the shipper had in the course of business with Middleton, learned that the latter's authority was limited, and that he could act only under directions from the superior officer or agent in New York. In this case nothing of the kind appears. Middleton came to the plaintiff and his partner and solicited their business for the line of which he was the agent. He did not assume to make any extraordinary or exceptional contracts with them. He represented that his line was doing business on exactly the same terms as to insurance and freight as the other transportation lines to Mobile. The plaintiff, therefore, had no reason to question his authority to make the contract, it being one in the ordinary conduct of the business. We are of opinion, therefore, that the contract of Middleton bound the defendant.

We think it was proper to admit evidence of contracts made by Middleton with other parties before and at the time of the alleged contract with the plaintiff, in which any requirement that the value of the goods should be declared before shipment was dispensed with. Middleton denied making these contracts. We assume that the evidence was not admissible for the purpose of impeaching Middleton nor for the purpose

of inferring that because Middleton had made an agreement of a certain character with one party it was probable he made a similar agreement with the plaintiff. (*McLoghlin v. Nat. Mohawk V. Bank*, 139 N. Y. 514.) It was competent, however, as direct evidence for the purpose of defining the contract that was actually made. The plaintiff testified that in the conversation between Middleton and his partner, in pursuance of which the shipment of the lost goods was directed, Middleton said that his line was doing business on the same terms as the others; that the freight rate included insurance of the goods, and that nothing was said as to any condition of requirement that the value of the goods should be declared in advance of shipment. Middleton testified that the conversation was a general one, but that he stated the necessity of declaring the value of the goods to secure the insurance. This last statement the plaintiff denies. Middleton also testified that afterwards he sent to the plaintiff's office the printed notice of sailing of the steamers, which contained the provision as to declaring the value of the goods in advance. The contract between the parties was not in writing but oral. It is true that if the jury found that the shipment was to be on exactly the same terms and conditions as those required by other lines the testimony admitted would have been unnecessary, because the fact was proved beyond dispute that those lines required no declaration of value in advance. But the jury might not so find. It might accept part of the plaintiff's testimony and reject the remainder. On the evidence (which it is unnecessary to recite in detail), it might find that the contract was to carry plaintiff's goods and insure them subject to the conditions and provisions required by the defendant in the ordinary conduct of its business at the time. It was, therefore, material and relevant to show that the defendant was at the time conducting its business not in accordance with the terms of the printed notice, but without requiring declaration of value in advance of shipment.

It is contended for the respondent that the trial court erred in refusing to charge that under the bill of lading the plaintiff

could, under no circumstances, recover any more than the value of the goods at the place of shipment. This request in any aspect of the case was too broad and properly refused because it ignored the fact that the jury might find the contract of insurance alleged. If the jury found the contract testified to by the plaintiff to have been made in Mobile between his firm and the defendant's agents, the bill of lading given at Boston when the plaintiff's consignor in pursuance of his instructions shipped the goods, did not constitute the contract between the parties and the rule that oral negotiations are merged in the written instruments has no application. Nor was the request correct in case of a recovery on the second cause of action, the unseaworthiness of the vessel, though as already stated the amount of the verdict shows that the recovery was on the first count. The measure of damages of breach of a contract of transportation was the value of the goods at the place of delivery. (*Sturgess v. Bissell*, 46 N. Y. 462.) This value was proved to be the invoice price with ten per cent added. The bill of lading provides that all liability under it "shall be estimated on the basis of the actual market value of the goods at the place and time of shipment." This provision for limitation of liability is not broad enough to relieve the carrier where the loss has occurred through its negligence or that of its servants. (*Magnin v. Dinsmore*, 56 N. Y. 168. See cases there cited.) We have not discussed separately the several exceptions to the charge of the learned trial court, or to each refusal to charge. They are numerous, but are all disposed of by the views we have expressed.

The judgment of the Appellate Division should be reversed and the judgment entered on the verdict at Trial Term should be affirmed, with costs.

O'BRIEN, BARTLETT, HAIGHT, VANN and LANDON, JJ., concur; PARKER, Ch. J., not sitting.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MICHAEL J. COFFEY, Appellant, v. THE DEMOCRATIC GENERAL COMMITTEE OF KINGS COUNTY, Respondent.

**PRIMARY ELECTION LAW — MEMBER OF GENERAL COMMITTEE CANNOT BE REMOVED BY COMMITTEE.** A member of the general committee of a political party of a county, who has been duly elected under the provisions of the Primary Election Law (L. 1899, ch. 473), cannot be removed from office as a member of such committee by the committee itself, under any pretext whatever, since it is the manifest intent of the statute that the majority of the primary voters are entitled to select any representative they may desire upon such committee, who shall be responsible to those electing him, and only to them, for his conduct.

*People ex rel. Coffey v. Democratic Gen. Com.*, 52 App. Div. 170, reversed.

(Argued June 13, 1900; decided October 9, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 5, 1900, reversing an order of Special Term granting a peremptory writ of mandamus requiring the defendant to place the name of the relator upon its membership roll and to restore him to the rights and privileges pertaining to membership in the Democratic general committee of Kings county.

At a primary election held in September, 1899, the relator was duly elected a member of the Democratic general committee of Kings county and afterwards duly qualified by paying the prescribed dues. At a meeting of such committee held March 23, 1900, he was, by resolution, expelled for alleged disloyalty and open hostility to the Democratic party, and has since been debarred from exercising the rights and privileges pertaining to his office as a member of such committee.

*Isaac M. Kapper* and *Luke D. Stapleton* for appellant. When the relator was elected a member of the Democratic general committee of Kings county in the manner prescribed by the Primary Election Law, he was elected to an office created by law, and his associates, elected at the same time and in the same manner as himself, were powerless to expel

him. (*People ex rel. v. Van Wyck*, 157 N. Y. 495; *People ex rel. v. Jeroloman*, 139 N. Y. 14, 18; *McKane v. Adams*, 123 N. Y. 609; Throop on Public Officers, § 8.) The Appellate Division erred in ruling that there was an inherent power in the respondent committee to expel one of its duly elected members. (*People ex rel. v. Hall*, 80 N. Y. 117; *People ex rel. v. Suprs. of Queens*, 131 N. Y. 468, 471; *People ex rel. v. Feeney*, 43 App. Div. 376; *Davidsburgh v. K. L. Ins. Co.*, 90 N. Y. 526; *Landers v. S. I. R. R. Co.*, 53 N. Y. 450; *Austin v. Searing*, 16 N. Y. 123.) The answer of the respondent to the relator's petition for the writ, asserting political hostility on his part at the last general election held in Kings county, is insufficient in law, and entitles the relator to the relief sought. (*People ex rel. v. Keeler*, 99 N. Y. 463.)

*E. Countryman*, intervening counsel. The Primary Election Law does not prescribe or require as a hard and fast rule that a member of either of the great political organizations shall support all of the candidates of his party at the general election. (L. 1899, ch. 473, §§ 2, 3.) The contention that the county committee had the inherent power to expel the plaintiff for hostility to one or more of the local nominees on the ticket of the Democratic organization is untenable. (Angell & Ames on Corp. [11th ed.] § 410; 2 Cook on Corp. [4th ed.] §§ 624, 711; *White v. Brownell*, 2 Daly, 329; *McKane v. Adams*, 123 N. Y. 609; *O'Brien v. Grant*, 146 N. Y. 164; *Belton v. Hatch*, 109 N. Y. 593; *People ex rel. v. N. Y. C. Exchange*, 8 Hun, 216; *Evans v. Phil. Club*, 50 Penn. St. 107; *Comm. v. S. P. B. Society*, 2 Binn. 441; *Comm. v. German Soc.*, 15 Penn. St. 251; *Beneficial Assn. of B. U. Case*, 38 Penn. St. 298, 300; 35 Penn. St. 151.)

*Charles J. Patterson* and *Henry J. Furlong* for respondent. If the rules and regulations contained no provision authorizing the expulsion of the relator for hostility, the general committee would still possess the inherent power and authority to expel him for cause. (Anson on Law & Custom

of Const. 56; May on Parl. Prac. 114; *Hiss v. Bartlett*, 3 Gray, 468; Cooley on Const. Lim. 159, 160; Story on Const. [5th ed.] § 838; Paschal's Anno. Const. 87, § 49; 1 Dillon Mun. Corp. [4th ed.] 329, § 242; *Rex v. Richards*, 1 Burr. 517; *People ex rel. v. Bd. Fire Underwriters*, 7 Hun, 248; *McKane v. Adams*, 123 N. Y. 609; L. 1899, ch. 473, § 9; *Sheehan v. McMahon*, 28 Misc. Rep. 733.) If the right of the general committee to expel the relator be dependent upon the existence of rules and regulations expressly authorizing it to do so, the existence of such rules and regulations is fully established. (*Matter of Guess*, 16 Misc. Rep. 307.) The claim that the relator was elected by the people and, therefore, could not be deprived of his office by the general committee is untenable. (*Hiss v. Bartlett*, 3 Gray, 468.) As the general committee had power to expel the relator for cause, the propriety of their action in so doing will not be reviewed upon an application for a mandamus. (*Matter of Abrams*, 45 Hun, 272, 273; *People ex rel. v. Chapin*, 104 N. Y. 96; *People ex rel. v. Chapin*, 103 N. Y. 635; *People ex rel. v. Barnes*, 114 N. Y. 317; *People ex rel. v. Supervisors*, 14 Abb. [N. C.] 29; *People ex rel. v. Hulse*, 38 Hun, 388; *People ex rel. v. Hall*, 80 N. Y. 117; *U. S. v. Black*, 128 U. S. 40; *People ex rel. v. New Rochelle*, 17 App. Div. 603; *People ex rel. v. Auditors*, 43 App. Div. 22.)

PARKER, Ch. J. The fundamental question in this case is whether a member of the general committee of a county may be removed from office as a member of the committee. The answer to it depends upon the construction now to be given to the Primary Election Law (Chapter 473 of the Laws of 1899, vol. II), section first of which, in declaring the application of the act, says: "It shall be *controlling*; (1) on the methods of enrolling the voters \* \* \*; (2) on primary elections \* \* \*; (3) on party conventions \* \* \*; (4) on the *choice* \* \* \* of *political committees* and on the *conduct of political committees* in and for any political subdivision of the state \* \* \*."

It will help us intelligently to consider the statute if we call to mind preceding legislation intended to protect the rights of minorities; the statute law looking to the purity of the ballot, and the organic law having for its purpose the encouragement of independent action in matters relating to municipal government. The help will come from our possession of the situation in which the legislators were when, in 1899, they passed the statute in question, which was in part composed of the general drift of public opinion and the fault which that public opinion had found with the machinery for the election of public officials. The settled conviction that the safeguarding of our institutions requires the untrammelled exercise of the franchise by the citizens and that the result be protected from fraud, has led to no inconsiderable amount of legislation during the present generation — legislation aimed largely, although not entirely, at the frauds of majorities who, at times, have manifested a disposition to retain their power, let the cost be what it might. The frauds that have perhaps occasioned the greatest amount of discussion resulted from colonization and repeating, for the correction of which several registry acts were passed. At the outset the legislation on that subject proceeded on the view that only in great cities were such frauds practiced, but such view proved to be partial, and in 1890 a general registry law was passed applicable to all of the state except the cities of New York and Brooklyn. (Chapter 321 of the Laws of 1890.) In those cities registration had long been required. (Chapter 142 of the Laws of 1880.) An enlightened public sentiment was at the same time making war against the evils of bribery and the outcome was a new departure in our method of voting, under the provisions of an act entitled “An act to promote the independence of voters at public elections, enforce the secrecy of the ballot, and provide for the printing and distribution of the ballot at public expense.” (Chapter 262 of the Laws of 1890.) This act inaugurated the voting booth; prohibited electioneering within one hundred and fifty feet of the polling place; took the burden of printing and distributing ballots from the



party organizations and placed it upon the public generally, and throughout teemed with provisions guarding against the frauds upon the ballot that experience had shown to be possible. Complaints had also been made that the practical effect of the power exercised by the organization was to render ineffective independent voting in purely municipal affairs, to the detriment of the best interests of the cities; and the recent constitutional convention (the work of which was subsequently ratified and adopted by the people) undertook to ameliorate the situation, to some extent, by providing that city officers should be elected at a different time than state officers, the election of the latter to take place in even, and the former in odd, numbered years, the reason assigned being that, unrestrained by national and state contests, the citizen would naturally be more independent, not only in voting, but in bringing about independent nominations whenever the party to which he belonged should attempt to make nominations intended to subserve the selfish purposes of the leaders rather than to promote the public interests.

Prior to 1882 there was no attempt to regulate by law the conduct of primaries, but chapter 154 of the laws of that year, known as the Chapin Act, declared certain acts committed at primaries crimes, such as the false personation of a voter, intentionally voting without right, prevention of others from voting, and fraudulent concealment or destruction of ballots. It also required that the presiding officers and inspectors at such an election should take the usual oath of inspectors at general elections, and provided for the challenge of voters and the administration of an oath to a person so challenged.

The act applied only to the city of Brooklyn, but in 1883 its operation was so extended as to include the entire state (Chapter 380 of the Laws of 1883), while four years later it was restricted to cities of ten thousand inhabitants or less. (Chapter 265 of the Laws of 1887.) The latter act, however, contained new provisions regulating the primary elections in all the cities of the state containing over ten thousand inhab-

itants. Among other things, it required the appointment of watchers, the examination of the ballot box before use, and that it should be so placed as to enable the voter and each watcher to see the ballot deposited, the keeping of a poll list of the voters, and the making and filing of returns in the county clerk's office. The qualifications a voter was required to possess under the Chapin Act (Section 2) and under the act of 1887 (Section 14), in addition to his being an elector, were those "prescribed by the regulations of the association holding the primary or convention."

While these provisions reduced to a considerable extent the wrongs which had been committed against the voter who desired to participate in the selection of the candidates of his party, and made snap caucuses impossible and the selection of delegates by brute force extremely difficult, still the right of the general committee to prescribe tests or qualifications for a voter was in some instances so employed as to exclude from participation in the primary many who were not in sympathy with the majority of the committee in all respects, and who might be termed members of a minority faction in the party. The not unnatural desire of the several general committees to perpetuate their power and control led, in some instances, to the making of "regulations" under which members who were not congenial to the majority were disciplined upon charges of disloyalty, inefficiency or mismanagement, and the places made vacant by their removal were oftentimes filled with men who, from choice or prudence, worked in harmony with the majority or the organization, for the latter term practically means the particular members of a party within a given territory who are, for the time being, in full control of its affairs.

In *McKane v. Adams* (123 N. Y. 609) it appeared that the plaintiff was formerly a member of the Democratic association of his town and a delegate upon the general committee of the county. Charges were preferred against the town association and the trial resulted in its being disbanded. A reorganization of the town association was undertaken and a primary election thereupon ordered by the general committee of the

county organization, at which the defendant was elected a delegate to the county committee. The general committee refused to accept the returns of the primary election and to recognize him as a delegate. It was held that membership in such an association is a privilege which may be accorded or withheld. And such being the status of a delegate to the general committee, that body could refuse to recognize the choice of a given constituency until such time as they should conclude to elect a delegate agreeable to the wishes of the majority, thus rendering futile all attempts at independent, otherwise termed "hostile," action.

These and other abuses, as they were called by the minority members of party associations, became so common that a demand was made for a primary election law sufficiently comprehensive in scope to assure to all citizens equal rights in the primary elections, conventions and political committees of the party with which they were allied. This demand the legislature undertook to meet by chapter 179 of the Laws of 1898, which was amended (but not in respects affecting this question) by chapter 473 of the Laws of 1899. These acts recognize the equal importance of primary and general elections and model the conduct of the former upon the general lines of conduct of the latter. They provide for the enrollment of the voter, and the only exaction permitted precedent to his right to enroll is that he shall express an intention to support generally at the next general state or national election the nominees of such party for state or national offices. (Section 3, subdivision 1.) No inquiry as to the past political conduct is permitted or promise as to future support of local candidates required. They provide for booths at public expense, in which the primary voter must in secret prepare his ballot; for ballots and their printing and subsequent folding so that the inspectors shall not be able to know for whom the ballot is cast; for the administration of an oath to a voter in case of a challenge; for challengers and watchers; for an annual primary day, and that the polls shall be held open for a fixed period of time. The dominant idea pervading the entire

statute is the absolute assurance to the citizen that his wish as to the conduct of the affairs of his party may be expressed through his ballot and thus given effect, whether it be in accord with the wishes of the leaders of his party or not, and that thus shall be put in effective operation, in the primaries, the underlying principle of democracy, which makes the will of an unfettered majority controlling. In other words, the scheme is to permit the voters to construct the organization from the bottom upwards, instead of permitting leaders to construct it from the top downwards.

Now, having in mind the purpose of this statute and the decision of this court in the *McKane* case—that membership in a county general committee is a privilege which may be accorded or withheld, not a right which can be gained independently and then enforced, inasmuch as the association is voluntary, being organized without a charter and regulated as to its action by a constitution and by-laws—let us further examine the statute and see whether the legislature intended to, and did, take away from the general committee the power, for any cause whatsoever, to expel members elected thereto by the voters of a town or ward.

In the first place, the voluntary character of the county general committee has been destroyed, for the statute expressly commands that “each party *shall have* a general committee for each county.” There is but one way to gain membership, says the statute, and that is through the suffrages of the members of the party exercised “at the primary elections on the annual primary day” and at “public expense.” (Section 4, subdivisions 2 and 3, and section 6.)

“The expense of official primary elections, including the expense of preparing new enrollment books and the compensation herein provided to be paid to primary election inspectors, shall be paid by the same officers or boards, and in the same manner, as the expenses of general elections.” (Section 4, subdivision 2.)

“There shall be two polling places in each of such primary districts which shall be designated and provided at *public*

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*expense* by the officers or boards whose duty it is to provide polling places for days of general election, and which shall be, so far as they are available, the same places which were used for the last preceding general election." (Section 4, subdivision 3.)

"The polling places, voting booths, guard rails, distance markers, ballot boxes, sample ballots and other supplies required for official primary elections shall be provided and paid for by the same officers, and in the same manner, as in the case of general elections, pursuant to sections 10 and 18 of the Election Law." (Section 6.)

The term of "office" of a member of the general committee, for such the statute declares it to be, is for a period of one year, but is to commence at a time fixed by the rules and regulations of the party, except that it shall not be later than the first day of January succeeding their election. And the general committee is commanded to meet and organize "on the day fixed by the rules and regulations of the party." At that meeting a member elected at the preceding town or ward primary may appear to assume the duties of the office to which he has been elected, and the production of a certificate of election from the "custodian of primary records, or a duplicate thereof, shall be sufficient to entitle the person named therein to be admitted to the \* \* \* committee to which he shall have been elected." Note, in passing, that there is no discretion vested in the committee, as the court said there was in the *McKane* case. The statute that calls the general committee into existence makes the certificate of the "custodian of primary records" proof of his election and right to exercise the duties of a member of the committee. And section 1 provides that "the act shall be controlling \* \* \* on the *choice* \* \* \* of the members of political committees and on the *conduct* of political committees in and for any political subdivision of the state." Does the recital of these provisions suggest that the legislature intended that the committee should be the judge of the election or other qualifications of its members, or that the primary voters should be the

judge? What was the object of the legislation — to protect the majority of the committee from enforced association with a disagreeable or “hostile” member, or to protect the right of the voters to have their wishes in party matters presented by their chosen representatives?

If the former, then legislation was not needed in that direction, for the general committees had a method of ridding themselves of offensive members, that was in full operation, as the *McKane* case witnesseth. If the latter was the object of the legislature, it is difficult to conceive how it could have taken more effective measures for its certain accomplishment. It provided that the statute should *control* not only the *choice* but also the *conduct* of political committees. The choice of the member it vested absolutely in the voter at the primary, reserving no voice whatever in the matter to his associates in the committee. It provided many things for the conduct of the committee, but the right to expel a member was not one of them. Power was given to a committee to prevent a member who had failed to pay his annual dues “from participating in the meetings of such committee.” Expulsion from, or forfeiture of, his office was not named as the penalty for non-payment of dues, but only exclusion from participation in the meetings. And it is apparent from a reading of the provisions that the words were chosen with a view of enabling the member to resume attendance of the meetings upon payment of dues. But if this provision were capable of being treated as authorizing expulsion for non-payment of dues, the maxim *expressio unius est exclusio alterius* would be applicable and call for a construction of the statute denying power to expel a member of the committee for any other reason.

But, to resume again the inquiry we were pursuing, whether it was possible for the legislature to have employed language more apt than it did to absolutely vest the power in the voters at the primary to select a representative in the general committee who should be responsible to them alone for the manner in which he should conduct himself, we observe, in addition to the provisions that the statute should control not only

the choice, but the conduct, as well, of the committee, that the details of the plan by which the choice is to be made by the primary voter are fully carried out and every one of them support in some measure the absolute supremacy of the majority at the primary. The annual enrollment; the statutory qualification of the voter; the private booth; the secret ballot and all the expensive machinery of a general election to be paid for out of the public treasury — why was it all required if the legislature intended to permit the majority of the committee to deprive the primary voters of the right of choice on any ground whatsoever? But it did not so intend; and, in the light of the abuses that the legislature set out to remedy, upon any possible reading of this statute there seems no room whatever for the contention that the right of removal for any cause was continued in the statutory general committee that now takes the place of the voluntary committee of other days.

If I am right in the views expressed, no other question need be considered, for the statute manifests an intent not to allow the committee, on any pretext whatever, to remove the committeeman from office, and it is the duty of this court to give full force and effect to that legislative intent.

It has been suggested that it would be intolerable for the members of a general committee to associate with a member who is hostile to the ticket, and that it follows that the legislature must be presumed to have had such a situation in mind. I answer — without assenting for one moment that the legal conclusion follows from the proposition of fact standing alone — that it does not stand alone; that the legislature was confronted with what it regarded as an abuse of the rights of the citizens in party matters, which compelled it to decide which was the lesser of two evils, to compel association occasionally with a member who is hostile to some portion of the party candidates or a majority of the committee, or to permit the general committee to deprive the primary voters of the choice of a representative. It decided that the wrongs that

had been and were being done to the primary voters exceeded that which could result from occasional association with a hostile member. In other words, it was determined that the majority of the primary voters were entitled to select any representative they might desire, who should be responsible to those electing him, and only to them, for his conduct in office. That determination should be given effect by the decision of this court agreeably to that well-understood canon of construction that commands the court in construing a statute to give effect to the intention of the legislature.

The suggestion that the provision of section 9, subdivision 1, requiring the general committee to meet and organize and authorizing the making of rules and regulations, but providing that unless rules be so adopted "the rules or regulations adopted by the last preceding county or general committee of said party in said county shall remain in full force and effect until repealed or amended in accordance with the provisions of this act," continues in force all the old rules and regulations, including those permitting the expulsion of members for the violation of rules, might furnish sufficient foundation for a controversy, notwithstanding the fact that such rules would be in open conflict with both the manifest purpose and clear reading of the statute, were it not that the opening provisions of subdivision 2 of the same section expressly so limit the effect of rules and regulations as that they shall not be inconsistent with the provisions of the statute. It reads as follows: "The rules and regulations of parties, and of the conventions and committees thereof, shall not be contrary to, or inconsistent with, the provisions of this act, or of any other law." If, therefore, the defendant were acting under the rules and regulations of its predecessor association (of which there is no hint in the record), so much thereof as provided for the trial and removal from office of a member of the committee has neither force nor effect, because contrary to and inconsistent with the provisions of this act.

The order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs.



CULLEN, J. (dissenting). It is practically conceded by the prevailing opinion that if there was any power in the general committee to expel the relator for cause, then, on the affidavits submitted by the parties, the application for a peremptory writ of mandamus should have been denied, whatever might have been the relator's rights, had he asked for an alternative writ. The sole question, therefore, necessary to be discussed on this appeal is whether there is power in the general committee of a political party to expel a member for misconduct in the member's duty to the committee, disloyalty or other cause.

I agree with the opinion of the learned Appellate Division that there is in the general committee for self-protection an inherent power to expel a member acting in hostility to the objects and purposes for which the committee was organized. It is not necessary that the power should be granted by the statute in terms; it will be presumed to exist unless the statute has denied it. The power of motion or removal of members is said by Chancellor KENT to be an ordinary incident of a corporation. (II Com. 278.) In *People ex rel. Bartlett v. Medical Society* (32 N. Y. 187) it was said: "We entertain no doubt that the county societies may still exercise the common-law power of expulsion, notwithstanding the remedy provided by statute which we regard as merely cumulative." In *People ex rel. Pinckney v. Fire Underwriters* (7 Hun, 248) it was said of the powers of the corporation then before the court: "It was merely an organization formed for promoting the proper transaction and management of the business of insurance, by its members, in a uniform manner. And its usefulness and success depended, in a very great measure, upon their faithful observance of its rules and regulations. That, under the charter, was an implied condition of membership, for the organization could be no otherwise maintained. And, for that reason, the corporation necessarily possessed the power of expulsion over members violating their obligations in that respect. It could not exist without it." This is not the rule as to stock corporations but it applies to all corporations or voluntary associations where

there exists a personal duty of the member to the corporation or association.

Why should not the same rule apply to the general committee of a political party? The members of that committee are certainly not public officers, for this reason, if for no other; public officers must, under the Constitution, be either appointed or elected, and if elected, then in the same manner as other elections by the people. (Const. art. X, sec. 2; *Matter of Gage*, 141 N. Y. 112.) They take no official oath. They cannot be indicted and removed for misconduct in office. It is difficult to imagine a case where the obligation of the member to the association is more purely ethical or more devoid of any legal attributes possible to be enforced by the courts. The political convictions of a member may change subsequent to his election and he may conscientiously desire the defeat of the party to which he has belonged. He may think that in no way can he accomplish that result more effectually than by remaining as a leader to share in the counsels and control of the party. Is the committee to be relegated to the chance of the member's sense of delicacy dictating his resignation, as the sole means of severing its connection with him? Is a county committee of the Prohibition party to be denied the right to exclude from its counsels a member who, subsequent to his election, engages in the manufacture or sale of intoxicating liquors, or has so little regard for his political principles as not to remain sober for a week at a time? It is said that the power of the general committee to expel members is not to be presumed because if it exists it may be abused. This is true of the exercise of all power. The question whether the relator was properly removed from his position does not arise on this record; if wrongfully removed, he may obtain redress in a proper proceeding and by proper averments in his petition.

The question discussed is all that is necessarily involved in this case, and I would rest here were it not for the announcement in the prevailing opinion of certain propositions from which I feel bound to express my dissent. It is asserted that

the organization and control of a political party are no longer matters of voluntary agreement among the members of that party, but that, under the statute relating to primary elections, every party must have a county committee and that committee must be appointed and organized in the particular way prescribed by the statute. This doctrine is made the foundation for the argument that the legislature meant to deprive the general committee, or party organization, of all power, except such as the statute gives in express terms. From this doctrine I dissent *toto coelo*. If the statute is to be so construed, in my judgment, it is unconstitutional and void. The right of the electors to organize and associate themselves for the purpose of choosing public officers is as absolute and beyond legislative control as their right to associate for the purpose of business or social intercourse or recreation. The legislature may, doubtless, forbid fraud, corruption, intimidation or other crimes in political organizations the same as in business associations, but beyond this it cannot go. Much is said of the evils that have grown up in the management of political parties and the dictation that has been exercised by political leaders and their invasion of the rights of the members of a party, and it is asserted that the statute intended to secure to all citizens equal rights in the management of the parties to which they may be allied. But an alliance cannot be made by one person alone. It requires the action of several whose rights are equal; no one can ally himself with others solely by his volition. Therefore, I do not see that an elector has any greater right to join a party unless on the conditions that the party prescribes, than he has to insist upon entering a partnership on contributing his quota of capital, against the wish of the parties then conducting the business. In *People v. Gillson* (109 N. Y. 389) it was held that a statute prohibiting any gift on the sale of any article of food, or any other article, as an inducement to purchase, was unconstitutional and void, in that it infringed upon the liberty of the dealer to pursue a lawful calling in the manner he chose to adopt. The liberty of the electors in the exercise of the right vested in them by the Constitution to choose

public officers on whatever principle or dictated by whatever motive they see fit, unless those motives contravene common morality and are, therefore, criminal, cannot be denied. It seems to me as absolute as the right to pursue any trade or calling, and, therefore, their right to associate and organize for that purpose is equally great. The statute of primary elections grants the right to join in the management of a party to any person on a declaration of his intention to support generally the candidates of that party, but a political organization may be unwilling to grant membership on these terms. It may make past conduct, and not future promise, the condition of membership. If the legislature can prescribe this test as a condition of membership in a party, I do not see why it may not require as a condition of voting at a Democratic primary a declaration of belief in the free coinage of silver at the ratio of sixteen to one, or of membership in the Republican party a denial of the application of the Constitution of the United States to the territories and dependencies of the country. Whether these are the fundamental doctrines of these parties, I do not attempt to say. If they are, it is for the parties themselves to so declare, not for the legislature. The rules and principles on which political parties are to be conducted must necessarily lie largely beyond the domain of legislative interference, because they relate to the action of the people, the ultimate source of sovereignty in what is unquestionably their prerogative, the election of public officers. It may be that what is apparently the present practice of the voters, the subordination of the choice of municipal and local officers to the partisan tests of national political parties, is an evil and leads to bad government. It may also be that the blind obedience of the electors in voting for the nominee of some political leader is a great evil and leads to corruption. As a public officer I have no opinion to express on these questions, though as a citizen I have a very positive judgment thereon. It may be that the voters think it is necessary to choose local officers on party lines for the purpose of maintaining their party organization and ultimately succeeding in the control of the government,

state or federal, on larger issues which they deem more important than local contests, and they may vote for nominees selected by political leaders because of implicit faith in the wisdom and integrity of those leaders. Of course it is equally possible that they are guided by no such reasons; but all this is something with which the legislature has no right to interfere, because in these matters the people are supreme. The legislature may doubtless, to a certain extent, affect the subject by providing for the conduct of elections in such manner as to render independent voting easy; but this is the extent of its power. The evil in all these things comes from the voluntary acts of the voters themselves, and can be corrected only by arousing the consciences of the electors to their responsibilities and duties. A rule which would permit interference with the liberty of an elector in his political action cannot be upheld, no matter how meritorious its object may be in a particular case.

I think the statute of primary elections can be sustained, however, where political parties voluntarily take advantage of it, that is to say, political parties may have their organizations and primaries outside of the statute if they choose; but, if they adopt the statutory primaries held at public expense, they become subject to statutory rules. This admission does not render the views expressed as to the power of the legislature to control political organizations irrelevant to the discussion of this case; for, if the subjection of the political parties to the provisions of the statute is voluntary, we may assume that the legislature did not intend to deprive party organizations of powers that they formerly had and seem almost necessary to their practical administration; powers which they would not be likely to surrender even for the advantage of holding their primaries at public expense. In analogy to the case of a corporation the ground for the expulsion of a member must be a cause arising since his election, at which time first comes into being the duty of the member to the committee. (*People ex rel. Pinckney v. Medical Society, supra; Farocett v. Charles*, 13 Wend. 477.)

The order appealed from should be affirmed, with costs.

HAIGHT, VANN and LANDON, JJ., concur with PARKER, Ch. J., for reversal; O'BRIEN J., concurs with CULLEN, J., for affirmance; and BARTLETT, J., concurs in result reached by CULLEN, J.

Order reversed, etc. \_\_\_\_\_

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s164	609
164	852
f165	812

In the Matter of the Application for the Revocation of the Probate of the Last Will and Testament of JOHN KEEFE, Deceased.

ANNA M. MILLER et al., Appellants; WILLIAM W. GREY, as Executor of JOHN KEEFE, Deceased, et al., Respondents.

APPEAL — PRESUMPTION OF REVERSAL UPON QUESTION OF LAW — CODE OF CIV. PRO. §§ 1838, 1861. An order of the Appellate Division which reverses a surrogate's decree revoking probate of a will, which does not state that the reversal was upon the facts, must be reversed if the record discloses no error of law and the decree of the surrogate affirmed.

*Matter of Keefe*, 47 App. Div. 214, reversed.

(Argued June 7, 1900; decided October 9, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, made November 14, 1899, reversing a decree of the Surrogate's Court of Rensselaer county revoking the probate of the last will and testament of John Keefe, deceased, and affirming a former decree which admitted such will to probate.

The facts, so far as material, are stated in the opinion.

*Charles Irving Oliver* and *Albert C. Tennant* for appellants. The findings of fact made by the trial court having been approved and affirmed by the unanimous decision of the Appellate Division, those facts as found will be accepted here as conclusive, and as they abundantly support the conclusions of law of the surrogate this court should reverse the order and decree appealed from without considering any of the other questions in the case. (*Koehler v. Hughes*, 148 N. Y. 507; *Randall v. N. Y. E. R. R. Co.*, 149 N. Y. 211; *Rosenstein*

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v. *Fox*, 150 N. Y. 354; *Kaplan v. N. Y. B. Co.*, 151 N. Y. 171; *People ex rel. v. Barker*, 155 N. Y. 322; *People ex rel. v. Van Wyck*, 157 N. Y. 495; Code Civ. Pro. § 1338; *Bom-eisler v. Forster*, 154 N. Y. 229; *Parker v. Day*, 155 N. Y. 383; *Wetmore v. Wetmore*, 162 N. Y. 503; *Petrie v. Hamilton College*, 158 N. Y. 458.)

*Robert W. Hardie* for respondents. The decision of the surrogate, revoking probate of the will, was properly reversed and the judgment of the Appellate Division, directing that the original probate of the will be affirmed, should be sustained. (Code Civ. Pro. § 2588; *Matter of Hunt*, 110 N. Y. 278; *Matter of Martin*, 98 N. Y. 193.)

BARTLETT, J. The testator died June 7th, 1898, leaving a last will and testament executed forty-eight hours prior to that event, and which was probated a few days thereafter.

The estate involved was a farm worth from \$12,000 to \$20,000, and personal property valued at about \$3,500.

The testator was a bachelor, eighty years of age, and left him surviving as his only heirs at law and next of kin two sisters, two nieces and a nephew.

Practically the entire estate was devised and bequeathed to strangers in blood, to wit, to the wife or family of the attending physician. The testator bequeathed to his aged sister, Margaret Keefe, with whom he had always resided and who was possessed of no means or property as the trial court found, the sum of two hundred dollars.

On the 10th of December, 1898, Anna M. Miller, the married sister of the testator, instituted this proceeding to revoke the probate of the will. A trial was had, considerable testimony taken and on the 22d day of May, 1899, a decree was entered, revoking the probate as to personal estate.

On November 14th, 1899, the Appellate Division reversed the decree of revocation and affirmed the original decree probating the will. We must assume that the decree was reversed upon a question of law, as the order appealed from does not state to the contrary. (Code of Civ. Pro., §§ 1338, 1361.)

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*Matter of Chapman*, 162 N. Y. 456; *Wetmore v. Wetmore*, 162 N. Y. 503; *People ex rel. Manhattan Ry. Co. v. Barker*, 152 N. Y. 417.)

The facts found by the trial court are deemed approved by the Appellate Division, and it remains for us to determine whether they sustain the legal conclusions based thereon.

We are permitted to examine the record only to ascertain if any of the findings of fact are unsupported by evidence, thereby disclosing legal error. (*Bomeisler v. Forster*, 154 N. Y. 237; *Snyder v. Seaman*, 157 N. Y. 453; *Petrie v. Trustees of Hamilton College*, 158 N. Y. 463; *People v. Adirondack Ry. Co.*, 160 N. Y. 229, 235; *Gannon v. McGuire*, 160 N. Y. 476; *Lannon v. Lynch*, 160 N. Y. 483; *Smith v. Syracuse Improvement Co.*, 161 N. Y. 489; *Spellman v. Looschen*, 162 N. Y. 268; *Shotwell v. Dixon*, 163 N. Y. 43; *National Harrow Co. v. Bement & Sons*, 163 N. Y. 505.)

A careful reading of the record leads us to the conclusion that there is a sharp conflict in the evidence as to fraud and undue influence, and particularly as to the inferences to be drawn from the testimony.

There is also a conflict of evidence as to the due execution of the will and as to testamentary capacity.

The learned counsel for the proponents and respondents, when considering this point, states in his brief as follows: "None of the testimony of any witness is contradictory to, or in conflict with, the testimony of any other witness, except in case of witness Havens."

This is a direct admission that there is a conflict of evidence, and the fact that this witness was, as suggested, contradicted by three other witnesses does not get rid of the question of fact.

This court recently, after reviewing a large number of cases, has laid down the rule that when the Appellate Division reverses on the law we have but three questions open to us here, viz. : The correctness of the rulings as to the admission and rejection of evidence; whether any material finding of fact is without evidence to support it, and whether the con-



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clusions of law are supported by the facts found. (*National Harrow Co. v. Bement & Sons*, 163 N. Y. 505, 508.)

We have presented here no questions as to the admission and rejection of evidence, and the briefs are largely devoted to a discussion of the facts, not as found, but as claimed to be established by the record. We are of opinion that there are no material findings of fact without evidence to support them, that the conclusions of law are supported by the facts found, and that no error of law is disclosed sustaining the reversal of the surrogate's decree by the Appellate Division.

The order of the Appellate Division and the decree of the Surrogate's Court of Rensselaer county, entered in pursuance of said order on the 19th day of January, 1900, should be reversed.

The decree of the Surrogate's Court of Rensselaer county, entered the 22d day of May, 1899, revoking the probate of the will of John Keefe, deceased, should be affirmed, with costs to the appellants in all the courts, payable out of the estate of said John Keefe, deceased.

PARKER, Ch. J., O'BRIEN, HAIGHT, VANN and CULLEN, JJ.,  
concur; LONDON, J., not sitting.

Order reversed, etc. \_\_\_\_\_

ROBERT H. McCUTCHEON, Respondent and Appellant, v.

CHARLES DITTMAN, Appellant, Impleaded with Others.

SOLOMON ISAACS et al., Respondents.

ATTORNEY AND CLIENT — WHEN CLIENT CHARGEABLE WITH KNOWLEDGE ACQUIRED BY ATTORNEY. Where the attorney of an attaching creditor who has levied upon the interest of his debtor in stock pledged as collateral security for a loan by a third person, subsequently acts as attorney for the lender in making a sale of the stock at public auction to pay the loan, at which sale the attaching creditor bids in the stock for an amount sufficient to pay the loan and expenses of sale, the attorney must be considered as the agent for both creditors in making the sale, and the creditor so purchasing is bound by any invalidity of the sale in respect of demand or notice of which the attorney had knowledge.

*McCutcheon v. Dittman*, 23 App. Div. 285, modified.

(Argued June 15, 1900; decided October 9, 1900.)

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 28, 1898, modifying and affirming, as modified, a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to recover certain shares of stock, or the value thereof, which had been pledged by plaintiff with the defendant Dittman as security for the payment of a promissory note for \$1,000.

The facts, so far as material, are stated in the opinions.

*J. E. Ludden* for plaintiff, respondent and appellant. The referee was right in holding that the defendants *S. Isaacs & Co.* were chargeable through their attorney with the knowledge of the circumstances under which the sale was made, and, therefore, were not purchasers and are not now holders of the stock in good faith. (*Bennett v. Buchan*, 76 N. Y. 386; *Constant v. University of Rochester*, 111 N. Y. 611; *Slattery v. Schwannecke*, 118 N. Y. 543; *Hyatt v. Clark*, 118 N. Y. 569; *Denton v. O. C. Nat. Bank*, 150 N. Y. 126.)

*David B. Hill* and *Leo G. Rosenblatt* for defendants, appellants and respondents. *S. Isaacs & Co.*, as purchasers, were not chargeable with constructive notice of irregularity in the notice of sale, although the person who, as Dittman's counsel, mailed the notice, happened at the same time to be the attorney of record for respondents in their collateral attachment suit (*Benedict v. Arnoux*, 154 N. Y. 715; *Denton v. O. C. Bank*, 150 N. Y. 126; *Slattery v. Schwannecke*, 118 N. Y. 543; *Constant v. University of Rochester*, 111 N. Y. 604; *U. U. Bank v. G. I. Co.*, 71 Fed. Rep. 473.)

BARTLETT, J. The judgment should be reversed as to the defendants *S. Isaacs & Company*.

We agree with the referee that, under all the circumstances, *S. Isaacs & Company* are chargeable with the knowledge of their attorney in regard to the stock in question and cannot be deemed *bona fide* purchasers thereof at the sale. It is

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undoubtedly the settled rule that a principal is only chargeable with notice communicated to, or knowledge acquired by his agent in another transaction at another time and when he was acting for another principal when clear proof is made that the knowledge or notice was present in the mind of the agent at the time of the transaction in question. (*Constant et al., Executors, etc., v. University of Rochester*, 111 N. Y. 604, 611.) S. Isaacs & Company are not only brought within the rule above stated, but the facts show essentially one transaction in the interest of S. Isaacs & Company which renders the rule inapplicable.

In November, 1895, the defendant Dittman loaned plaintiff \$1,000.00, secured by fifty-three shares of the United States Printing Company's stock.

In December, 1895, S. Isaacs & Company began an action against plaintiff and others and attached the interest of plaintiff in the stock held by Dittman. In this action David Calman appeared as attorney for S. Isaacs & Company, and thus became advised a year before the public sale of the stock by Dittman that plaintiff had a large interest in the stock above the amount for which it was pledged. It will not be disputed that S. Isaacs & Company are chargeable with this knowledge.

The par value of the stock was \$5,300.00, and it was alleged in the complaint that it was actually worth \$4,240.00.

A year later, in December, 1896, the same attorney, acting for defendant Dittman as alleged, had in charge the public sale of this stock, which is found by the referee to have been irregular, wrongful and a conversion thereof by reason of no previous demand of payment of the plaintiff's indebtedness, and no legal notice of sale.

At this sale S. Isaacs & Company bid in the stock for \$1,083.78, enough to pay Dittman's loan to plaintiff. It is evident that the precise knowledge of this situation was in the mind of the attorney at the time of the sale, within the rule referred to above, so that it is of no importance whether he was acting for Dittman or S. Isaacs & Company.

It is equally apparent that these facts show one transaction

in regard to the stock. In the first transaction the attorney attaches the interest of plaintiff in the stock subject to the pledge, and in the second proceeding, by means of a sale without demand or notice, sought to extinguish plaintiff's interest in the stock without payment of its full value and vest it in his clients, S. Isaacs & Company.

The latter now seek to retain the fruits of this transaction, notwithstanding they have been tendered their bid and interest, by invoking the rule that their attorney only represented Dittman at the sale and consequently they are *bona fide* purchasers.

We agree to the affirmance of the judgment of the Appellate Division as to defendant Dittman, but are of opinion it should be reversed as to S. Isaacs & Company.

The judgment of the Appellate Division as to defendant Dittman should be affirmed, with costs; judgment as to defendants S. Isaacs & Company should be reversed and a new trial ordered, with costs to abide the event.

PARKER, Ch. J. (dissenting). In November, 1895, McCutcheon, this plaintiff, borrowed one thousand dollars of the defendant Dittman, giving therefor his promissory note, together with fifty-three shares of the United States Printing Company's stock as collateral. Before the note matured S. Isaacs & Company attached McCutcheon's interest in the stock pledged to Dittman. Negotiations entered into between McCutcheon, Dittman and S. Isaacs & Company resulted in a tripartite agreement, by which it was agreed, among other things, that the one-thousand-dollar note should be renewed for the further period of six months, and that Dittman should hold the United States Printing Company's stock as collateral, *first*, for the payment of the one-thousand-dollar note; *second*, for the payment of any sum that should be found due to S. Isaacs & Company in the suit in which the attachment was issued, and, *third*, the overplus to be turned over to McCutcheon. In pursuance thereof the note was renewed and it became due November 20, 1896, at which time it was presented for payment to

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the bank where it was made payable, but it was not paid and the note was duly protested. Very shortly afterwards the stock was by McCutcheon turned over to Adrian H. Muller & Sons for sale, and in their notice of sale of securities for December 2d, 1896, they inserted "53 shares U. S. Printing stock." The stock was not otherwise referred to in the notice of sale, and on the second day of December, at public auction, it was struck down to defendants, S. Isaacs & Company, for the sum of \$1,083, which was a little more than the amount due on Dittman's note for principal and interest. One Calman acted as the attorney for Dittman in the matter of selling the stock, and on November 28th he cut out of the *New York Times* Adrian H. Muller & Sons' notice of sale of securities which included "53 shares of U. S. Printing stock," and after making a mark opposite each end of the line referring to that stock, he inclosed it in an envelope duly addressed to McCutcheon, and caused the same to be mailed. No other notice was given or attempted to be given to McCutcheon, who did not learn that a sale of his stock was threatened until after S. Isaacs & Company had become the purchasers. Then he attempted to get it back, but failing in his effort, he brought this suit on the equity side of the court, alleging the facts and praying judgment that the defendants be required to turn over the stock to him, or that if this could not be done, that the defendants be decreed to pay him the value of the stock.

The suit was tried before a referee who directed judgment against the defendants, Dittman and S. Isaacs & Company, either for a return of the stock or for its value; the ground upon which he directed judgment against Dittman was that he had failed to cause to be given to McCutcheon such a notice of the sale of the stock as the law required, and the recovery against S. Isaacs & Company was predicated on the fact that Calman, who was Dittman's attorney in the matter of the sale of the pledge, was also their attorney in the attachment suit and in this action and that S. Isaacs & Company were chargeable with the knowledge which he acquired while

conducting the proceedings for the sale of the stock in behalf of Dittman. The final judgment entered upon the report of the referee, and the intermediate proceedings had, was affirmed by the Appellate Division in so far as it directed judgment against the defendant Dittman, but was reversed as to the defendants composing the firm of S. Isaacs & Company.

There are several questions discussed on Dittman's appeal relating to the practice adopted in this case and to the merits. It was within the power of the court to render the judgment that it did and the errors of procedure, if such there were, seem not to have been brought to the attention of the courts below by exception or otherwise, and criticism of them cannot be listened to for the first time on this review.

The only question, therefore, that need be referred to is whether a sufficient notice of sale of the stock was given to McCutcheon. It is the law in this state, in the absence of a contract controlling the question of notice, that the pledgor must have notice of the time and place of sale of the pledge. This rule of law was created for the purpose of protecting the pledgor, and it affords him an opportunity to attend the sale and see that it is fairly conducted, to exert himself in procuring buyers, thus, perhaps, enhancing the price, and enables him to assert the right belonging to him of redeeming the pledge at any moment before the sale is actually made. A notice that does not fairly apprise the pledgor of the time and place of the sale of his stock is not within the requirement of the law, and should not be brought within it by any strained construction. Now, it is true that by this publication Adrian H. Muller & Sons did give notice to all that should see fit to read their advertisement that they would sell at a given hour, on the second day of December, "53 shares of U. S. Printing Stock," and it turns out that such stock was the stock pledged by McCutcheon, but the notice did not state that it was the stock pledged by McCutcheon to Dittman. There was nothing in the notice which identified the fifty-three shares of stock so advertised to be sold as the shares which had been

pledged by McCutcheon to Dittman ; indeed, there was nothing in it to have put him on guard had he read it except that the number of shares to be sold was precisely the number of shares that the defendant pledged to Dittman.

Without that further amplification of which the subject is capable I state my conclusion to be that the courts below were right in the determination that the so-called notice did not meet with the requirements of the law.

It is further urged in Dittman's behalf that an exception taken to the ruling of the court in admitting evidence as to the value of the stock on the day of its sale, constituted an error ; and also that there was no legal proof, other than that furnished by the auction sale, of the value of the stock. A question was asked to which objection was made, which did not call for the market value of the stock and the objection was overruled and an exception taken, but the witness did not answer that question ; instead, he asked the question : " What do you mean by value ? " And the attorney replied : " Do you know the market value of it ? " It appears, therefore, that before any attempt was made to answer the objectionable question, it had been modified and put in proper form. Later the witness undertook to fix its value from his knowledge of the inventory value of the property and the surplus account of the company, but this evidence was not objected to, nor was a motion made to strike it out.

As to the contention that there was no legal proof of damage, it is said, first, that the record contains no evidence of the market value of the stock except that established presumptively by the auction sale itself. This is true, but there is other evidence of value than that of market value ; still as to that evidence the appellant insists that it should not have been received until after it had been shown that the stock did not have a market value — a proposition that cannot be gainsaid ; but the difficulty is that the attention of the trial court was not called to the fact, by objection, that the plaintiff had omitted to show that the stock was without market value, and the court may well have proceeded on the theory that the fact

that the stock had no market value was so well known to counsel on both sides that objection was not made by the defendant when the plaintiff attempted to prove the elements tending to show value, as a party may always do when the chattel has no market value. While the witness said that he took into account the inventory value and surplus account, he did not give the details so that the jury could form an opinion from the facts thus given, but instead gave his own opinion. The testimony as given was open to objection, but as objection was not made we must treat the evidence in the form in which it was brought in as having been regarded as satisfactory to both parties, and, thus treating it, it cannot be questioned that the referee's finding as to value has evidence to support it.

The plaintiff appeals from the reversal of the judgment against the members of the firm of S. Isaacs & Company, and as the trial was had before a referee we are required to presume that the judgment was not reversed upon a question of fact, and the question of law presented to that court in this case was whether the facts found supported the conclusion of law. (*National Harrow Co. v. Bement & Sons*, 163 N. Y. 505.) The Appellate Division has reached the conclusion that they do not, and that that court is right will sufficiently appear from a statement of the facts found upon which the conclusion was predicated by the referee that S. Isaacs & Company were chargeable with the knowledge of the attorney who conducted the proceedings.

If the findings showed that Calman had acted as the attorney for S. Isaacs & Company in any way in the proceeding to sell the stock, or had bought the stock for them, then would the conclusion of law of the referee have support in the facts found. But the findings contain no hint to that effect. They do not even suggest that Calman either advised them to buy the stock or knew that they contemplated making the purchase. What the findings do state is that Calman was the attorney for S. Isaacs & Company in two actions, viz., the attachment suit and this action. The portion of the finding relating



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to that subject, after referring to the commencement of the action in which the attachment was issued, reads as follows: "The said action was pending, and said attachment was in force on the second of December, 1896, the day the said stock was sold by Dittman, as above stated. The attorney for Isaacs & Company in said action was also the attorney for Dittman in the proceedings taken for the sale of said stock, and is the attorney for the defendants Dittman and S. Isaacs & Company herein."

It seems to me that it cannot be held that because Calman appeared for all of the defendants in this action, that, therefore, they are chargeable in a prior proceeding with the knowledge that their present attorney acquired in such prior proceeding, or that because they once brought an action and to that end employed a lawyer, they are chargeable with any and all knowledge that their former attorney may have become possessed of in some subsequent proceeding. Unless one of these propositions is unsound this judgment should stand, and it is difficult to find any basis for such a claim in the face of the well-established general rule that a principal is chargeable with the knowledge of his attorney only in matters in which the attorney acts for him.

To illustrate with this case, had Calman bought in the stock for S. Isaacs & Company he would have been acting in their place and stead, and they would have been chargeable with the knowledge that he had acquired in the earlier stages of the same transaction. But this court has never gone further in the direction of holding a principal chargeable with the knowledge of facts communicated to his agent than to hold that such facts must be communicated, either in the matter in which the latter represents the former, or prior thereto, but under circumstances surrounding and following it of such a nature as to cause such facts to be present in the mind of the agent at the time of doing the act for the principal, which the latter would have protected on the ground that it was done in good faith and necessarily without knowledge of the facts. (*Constant v. University of Rochester*, 111 N. Y. 604,

611.) In other words, there must be a principal and an agent in the particular transaction as to which it is charged that the apparent advantage of the principal can be overcome by proof, that while he may not have known the truth, the agent, who represented him in the transaction and who stood in his shoes as to it, did know. It was said in the *Constant Case* (*supra*) that the courts have not gone further, and it may be added now that there is no room for such an extension of the doctrine as will reach a case where there does not exist the relationship of principal and agent, for it has its foundation in that relationship.

These findings contain, as I have said, no hint that Calman was acting for S. Isaacs & Company in any respect whatever in the proceeding to sell the stock, and he was not, therefore, their agent in that matter; but as this was a short decision, the Appellate Division, as was their duty, looked into the record to see whether there were any facts in support of the decision of the referee as to S. Isaacs & Company, and the learned presiding justice summed up the result of the investigation as follows: "In the case at bar there is no evidence whatever that Calman did anything in reference to this stock as attorney for Isaacs & Co. after the extension had been signed six months before the sale took place. There is no evidence that he had any communication with them in regard to their becoming purchasers upon the sale, or that he acted in any way in connection with the said sale as their attorney."

The Appellate Division was, therefore, right in holding that as to the defendants, S. Isaacs & Company, the findings did not support the conclusions of law as against them, and it follows that the judgment should be affirmed.

HAIGHT, VANN and LANDON, JJ., concur with BARTLETT, J., and CULLEN, J., concurs in result; O'BRIEN, J., concurs with PARKER, Ch. J.

Judgment accordingly.

In the Matter of the Application of MARGARET A. HUNTER, Respondent, to have Vacated an Assessment for the Construction of a Sewer in Rawson and Third Streets in the City of Albany.

CITY OF ALBANY, Appellant.

MUNICIPAL CORPORATION—DEDICATION OF STREET—ACCEPTANCE BY AUTHORITIES—NEW METHOD CREATED BY CITY CHARTER NOT EXCLUSIVE. When a city charter provides a new way of accepting land tendered for a public street, and does not purport to provide an exclusive method of tender and acceptance, it does not preclude existing methods of dedication under the common law, and the courts cannot make a limitation the legislature did not impose, since if an extreme and extraordinary change of the common law had been intended it would expressly appear and not be left to implication.

(Submitted October 1, 1900; decided October 23, 1900.)

MOTION for reargument. (See 163 N. Y. 542.)

*W. Frothingham* for motion.

*Arthur L. Andrews* opposed.

VANN, J. Upon deciding the appeal in this matter we held that a strip of land in the city of Albany, which for years had been thrown open by the owner to public use, had been designated by him as Rawson street and had been generally known and used as a highway under that name, became one of the streets of the city upon the passage of an ordinance by the common council directing the construction of a sewer therein, and referring to it as a street *eo nomine*. (*Matter of Hunter*, 163 N. Y. 542.) We are now asked by this motion to consider the effect of a section of the city charter which provides that "all streets, avenues and alleys in said city which have been or may be thrown open to public use, and have been or may be used as such for five years continuously, shall be deemed and taken to be public streets, avenues and alleys; provided that the common council shall,

by a vote of two-thirds of all the members elected thereto, accept such streets, avenues and alleys; and the city of Albany and the common council thereof shall have all jurisdiction and power in respect thereto, the same as if such streets, avenues and alleys had been or shall be opened by proceedings, had for that purpose under the provisions of this act." (Laws of 1891, chap. 286, § 31.)

Although we had considered the subject, we did not give expression to our views thereon, because every question raised by counsel cannot be formally discussed without unduly lengthening the opinion, and to merely state the conclusion of the court without giving its reasons adds little to the necessary effect of the decision. Since counsel regard the point as of importance to the public, as well as to the municipal authorities with reference to future action, we will briefly announce our views.

The court held in its opinion that the land in question became a public street through tender of dedication by the owner and acceptance by the city, according to the principles of the common law governing the subject. The charter, by simply providing a new way to accept, did not blot out the old way, nor abolish the common law relating to dedication. The effect of the statute is not exclusive because it does not purport to provide an exclusive method of tender and acceptance, and if the legislature had so intended the presumption is that it would have so stated. A statute making an innovation upon the common law should not be extended in operation or effect beyond the fair and reasonable import of the words used. (*Mushlitt v. Silverman*, 50 N. Y. 360, 362.) As the act does not preclude existing methods, the courts cannot make a limitation which the legislature did not impose. Any other construction than the one we have indicated might result in serious public inconvenience, as the members of the legislature are presumed to have known when they passed the statute. If land in the city of Albany is thrown open by the owner to public use as a street for year after year, and there is a general desire that it should become a street, why

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should the legislature compel the public authorities to wait for five full years before they can accept it as a street, when the interest of the city requires immediate acceptance? Why should user for five years be required, if the land is needed at once? Why should a body, which has power at any time to purchase or condemn real property for a street, be compelled to wait so long before it can accept the land needed as a gift? If there has been a tender of dedication, with public user for a much longer period than five years, and the people have not only built with reference to the land as a street, but the common council has repeatedly recognized it as a street by grading, paving and naming it so that it is practically a city street, why should the legislature require a formal acceptance by an ordinance passed by a vote of two-thirds of all the members of the common council in order to make it a lawful highway? Why should the hands of the city be tied unnecessarily, or formal action be imperatively required, in order to make a street out of that which, for all practical purposes, has been a street for years? While the argument *ab inconvenienti* is not controlling, these questions have a bearing upon the intention of the legislature, and confirm the view that if an extreme and extraordinary change of the common law had been intended, it would expressly appear and not be left to implication.

But, it may be asked, what was the object of the statute? There may have been several, such as a desire to authorize a method of acceptance capable of easy proof, or that the city should be able to acquire the fee of a street by dedication, the same as the charter authorizes through the process of condemnation. (L. 1883, ch. 298, p. 405.) We are not, however, required to now answer this question, as the present controversy is disposed of by holding that the charter does not provide the only way to accept a tender of dedication.

The motion should be denied, with \$10 costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT and CULLEN JJ., concur; LONDON, J., not sitting.

Motion denied.

164	368
f164	584
s164	585

ELIZABETH S. VAN BEUREN et al., Respondents, *v.* FRANCES  
A. WOTHERSPOON et al., Appellants.

1. **APPEAL—REVERSAL BY APPELLATE DIVISION WITHOUT AWARDING NEW TRIAL.** A reversal of a judgment of the trial court by the Appellate Division without awarding a new trial, but ordering a referee to take certain proof and report it to the Special Term, with a direction for final judgment thereon, is unauthorized and irregular, and must be set aside.

2. **PRESUMPTION AS TO REVERSAL UPON QUESTIONS OF LAW.** A reversal of a judgment of the trial court by the Appellate Division must be presumed under the Code of Civil Procedure, section 1338, to have been made upon questions of law, when the order of reversal contains no statement that the judgment was reversed upon the facts.

3. **REVERSAL OF JUDGMENT DISMISSING COMPLAINT.** A judgment, dismissing the complaint for lack of diligence or effort upon the part of the plaintiffs to procure a valuation of property in the manner prescribed by a lease, cannot be reversed by the Appellate Division upon the law, although it might have been reversed upon the facts, unless the judgment was without any evidence to support it.

4. **LANDLORD AND TENANT—COVENANT FOR RENEWAL ON EXPIRATION OF TERM—PAYMENT OF RENT WHILE HOLDING OVER.** A lessee, at the expiration of the term under a lease for a term of years containing a covenant on the part of the lessor that at such expiration the lessee shall be paid the appraised value of the building or a new lease granted at an appraised rental, is entitled to retain the possession until the covenant shall be performed by the lessor, and is liable for no more than the rent originally reserved while thus continuing in possession.

*Van Beuren v. Wotherspoon*, 22 App. Div. 628, modified.

(Argued May 9, 1900; decided June 12, 1900; motion for reargument submitted October 1, 1900; denied October 28, 1900.)

**APPEAL** from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 22, 1897, affirming a judgment in favor of plaintiffs entered upon the report of a referee.

On the second day of March, 1874, Mary S. Van Beuren and Caroline Hoppock devisee under the will of Samuel Cary, entered into a written lease under their hands and seals, whereby the former, in consideration of the annual rent of one thousand dollars to be paid by the latter, leased to her prem-

ises situated on Fourteenth street, in the city of New York, for the period of twenty-one years. The lease contained a covenant that at the expiration of that term the lessor should have a choice either to grant a renewal of such lease for the further term of twenty-one years at such rent as should be agreed upon or be established by appraisers in the manner stated therein, or to pay to the lessee the value of the front building on the premises to be ascertained by three disinterested persons. It was further agreed that whenever the lessor refused to grant a renewal, the building or its substitute should be valued in the manner stated, but that the lessee should not be compelled to surrender the premises until the payment for the building had been made or tendered, if the valuation was before the expiration of the term or was prevented by the fault of the lessor; that if the lessor should, at the expiration of any term granted, elect and choose to pay the value of the building and actually make or tender such payment, or if the valuation should not be made before the expiration of the term in consequence of any act of the lessee, then the lessee should deliver up the possession of the building and the lessor should pay the lessee the value of it when such valuation was made, or grant a new lease. The lessor was not required to make her election in any case until both valuations had been made, unless prevented by the fault of the lessor.

The lessee died in November, 1890, and her interest vested in the defendants. In August, 1894, the lessor died, and the plaintiffs succeeded to her title to the premises in question. By the terms of the lease it expired on the 1st of March, 1895. For some time prior thereto the defendants made continued efforts to ascertain from the plaintiffs whether they would renew the lease or whether they would acquire title to the building thereon under the provisions of the existing lease, and sought to have them agree upon the respective valuations. But the plaintiffs refused to make any election, and made none until after the final judgment in this case, nor did they even indicate what they wished or proposed to do. They would neither decide whether they would renew the lease, nor state

the amount of rent at which they would renew, nor agree upon any value for the building. From early in December, 1894, until the middle of February, 1895, the defendants persistently sought to obtain either a lease of the premises or a valuation of the building thereon by agreement, and the plaintiffs as persistently refused to make any statement upon the subject, but evaded all efforts upon the part of the defendants to reach an agreement or to obtain from the plaintiffs an offer in relation to the rent or an offer for the building.

After these efforts had been made and about six days before the expiration of the term for which the lease was given, the defendants, to procure a determination of the matter, notified the plaintiffs that they had chosen an arbitrator and requested them immediately to appoint one so that the values might be determined before the expiration of the term. On the twenty-fifth of that month the plaintiffs also named an arbitrator. Upon the hearing before the arbitrators the defendants endeavored to have the plaintiffs agree to the selection of a third arbitrator or umpire, so that the matter might be more speedily determined. That the plaintiffs were unwilling to do, but insisted upon a technical compliance with the lease. The defendants endeavored also to make some agreement with them as to the valuation of the lot and building independently of the arbitration, but the plaintiffs preferred to follow the formal proceedings provided by the lease.

Testimony was taken before the arbitrators at some length, and it was not concluded until the latter part of July, 1895, when each arbitrator made a separate and different award, and hence there was no agreement upon the questions submitted. Then followed an extended correspondence between the parties in regard to the selection of an umpire. There appears to have been a variety of causes which seemed to prevent the selection of an umpire, and thus matters remained until about the middle of January, 1896, when this action was commenced. Its purpose was to obtain a judgment fixing the valuation of the lot and building either by a decision of the court or by the appointment of proper persons to appraise their value.



The complaint alleged the making of the lease, the ownership of the premises and the rights of the defendants, and the action of the plaintiffs to procure a valuation under the lease. The answer denied the allegations of the complaint so far as it was alleged that the defendants were in default in not procuring or aiding to procure a determination of such valuation, set up the neglect and refusal of the plaintiffs to place any valuation upon the lot or building, insisted upon their right to have the valuation made as prescribed in the lease and not by the court, and demanded judgment for a dismissal of the complaint.

The action was tried at a Special Term, which, after taking the proofs of the parties, dismissed the complaint upon the merits upon the ground that the plaintiffs had not shown or established any such diligence upon their part to procure the valuation of the lot and building in the manner provided by the lease as entitled them to maintain the action. Upon the decision of the trial court and on June 27, 1896, judgment was entered in favor of the defendants dismissing the complaint upon the merits. Upon the seventh of the following July the plaintiffs excepted to the decision of the trial court, and on the same day appealed from that judgment to the Appellate Division in the first department. The latter court reversed the judgment of the Special Term without awarding a new trial and directed a judgment as follows: "That the judgment so appealed from be and the same hereby is reversed, with costs and disbursements of this appeal, and it is hereby adjudged that John Lindley, counselor at law of the city of New York, be appointed as referee to appraise and value separately the lot of land and the building described in the complaint as of March 1, 1895, and to take proof of the value of the use and occupation of said premises from March 1, 1895, the expiration of said term, to the time of making his said report, with interest thereon, and of all the arrears of rent, taxes and assessments, if any, with interest, which were due prior to March 1, 1895, and also to take proof of all taxes which have become due since March 1, 1895, and which also shall have been paid by the defendants or either of them;

that the said referee shall report to the Special Term of the Supreme Court with all convenient speed, and, upon the coming in of said report and its confirmation according to the rules and practice, the said Special Term shall enter a final judgment herein. It is further adjudged that, within twenty days after the entry of said final judgment, the plaintiffs shall have the right to elect either to grant a renewal of the lease referred to in said complaint, which expired on the 1st day of March, 1895, for the further term of twenty-one years thence next ensuing at the annual rent of 5% of the amount of the appraisal or valuation of said lot of land, to be made as aforesaid, for such further term, and in other respects on the terms and conditions contained in said expired lease; or to pay to the said defendants, as their interest may appear, or to their executors, administrators or assigns, the value of the building on the said lot of land referred to in the complaint, to be ascertained as hereinbefore provided. Said election to be made after both of said valuations shall have been made. And that in case the plaintiffs, after such valuations shall have been so made, shall elect to make a renewal of said lease, they shall tender to the defendants a new lease as of March 1st, 1895, at a rental to be ascertained as aforesaid, and in other respects upon the terms provided in said expired lease; and that in case the plaintiffs, after such valuations shall have been so made, shall elect to pay the value of said building, the defendants forthwith shall deliver up the possession of the said premises on the payment or tender by the plaintiffs of such valuation of said building so fixed, with interest from March 1st, 1895, together with such taxes as have fallen due since March 1, 1895, and which also shall have been paid by the defendants or either of them, and interest thereon from the day on which the same shall have been paid, after deducting from the said valuation of the said building the value of the use and occupation of said premises from March 1st, 1895, the expiration of said term, to the time of making his, the said referee's, report, with interest thereon, and of all the arrears of rent, taxes and assessments, if any, with interest, which were due prior to March 1st, 1895, as

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found in said judgment. It is further adjudged that the plaintiffs recover from the defendants the costs and disbursements in this action, to be taxed by the clerk; and that until after the election of the plaintiffs either to renew said lease or to pay the value of the building, either party may apply to the court at the foot of said judgment for any further or other order or relief to which he may be advised that he is entitled, not inconsistent with this judgment, and necessary to final and complete relief in the action."

In pursuance of that judgment or order, the referee named took proof upon the questions stated, and made a report thereon to the Special Term by which it was confirmed and adopted. At the opening of the trial before the referee, the defendants objected to proceeding before him upon the ground that the Appellate Division had no power to order such a reference in the action. This objection was overruled and the defendants excepted. The referee thereupon proceeded to take proof under the order or judgment of the Appellate Division as it was finally settled by that court.

Upon the report of the referee, which was confirmed, the Special Term directed judgment thereon, reversing the judgment entered upon the first trial. It then determined that the value of the lot in question on March 1, 1895, was one hundred thousand dollars; that the value of the building on the same day was fifteen thousand one hundred dollars, and that with interest it amounted to \$16,912; that the taxes which had been paid by the defendants for the years 1895 and 1896 amounted, with interest, to \$2,112.71; that the value of the use of the land and building from March 1, 1895, to March 1, 1897, with interest, was \$17,627.41, being at the rate of \$8,300 per year, payable monthly in advance; that the plaintiffs had the right to elect either to grant a renewal of the lease for the further term of twenty-one years at the rent of five thousand dollars, or to pay the value of the building which, with interest, amounted to \$16,912; that the defendants were entitled to credit for taxes which, with interest, amounted to \$2,287.10; that the value of the building

with the amount of taxes paid by the defendants, together with interest, amounted to \$19,199.10; that from that amount should be deducted the value of the use of the premises from March 1, 1895, to March 1, 1897, with interest, amounting to \$17,788.99, and costs to the amount of \$616.15, making the total credit to the plaintiffs \$18,405.14, and leaving only the sum of \$793.96 to be paid to the defendants for the building; that the plaintiffs should elect within twenty days after final judgment and notice thereof either to renew the lease or to pay the value of the building; that if they elected to renew the lease they should tender it as of March 1, 1895, at the rent of five thousand dollars per annum, payable as in former years, but that if the plaintiffs elected to pay the value of the building the defendants should forthwith deliver up the possession upon the payment or tender of \$793.96; that if the plaintiffs elected to grant a renewal of the lease the defendants should still pay \$616.15 costs and disbursements, and that the judgment should not be a bar or defense to any action by the plaintiffs to recover for the use and occupation of the premises.

From that judgment an appeal was taken to the Appellate Division, where it was unanimously affirmed, and the defendants have now appealed to this court. The notice of appeal brings up for review not only the last judgment, but also the judgment or order of the Appellate Division of January 14, 1897, which reversed the first judgment of the Special Term dismissing the complaint and appointing a referee to determine the questions mentioned. The order reversing the original judgment entered upon the decision of the trial court contained no statement that it was reversed upon the facts, nor did the second judgment affirming the action of the Special Term and referee contain any such statement.

*Nelson S. Spencer* for appellants. The decision of the Appellate Division does not state that the judgment was reversed upon a question of fact. It must, therefore, be presumed that the reversal was based wholly upon errors of law,

and that the facts found were approved by that court. (*People v. A. Ry. Co.*, 160 N. Y. 225; *Spellman v. Looschen*, 162 N. Y. 268.) The judgment of the Special Term was right. The court will not interfere with or take upon itself the duties of arbitrators unless the necessity for doing so is clear. (*Livingston v. Sage*, 95 N. Y. 289; *Matter of N. Y., L. & W. Ry. Co.*, 102 N. Y. 704; *Hood v. Hartshorn*, 100 Mass. 117; *R. P. D. Church v. Parkhurst*, 4 Bosw. 491.) The plaintiffs are not absolved from the agreement of arbitration unless the defendants have acted in bad faith. The question of good faith is one of fact which has been decided by the trial court in the defendants' favor. (*Urhig v. W. C. F. Ins. Co.*, 101 N. Y. 362.) The plaintiffs were in fault and responsible for any delay which occurred in refusing to allow an umpire to be chosen to sit with the arbitrators. (*Day v. Hammond*, 57 N. Y. 479; *Morse on Arbitration*, 243.) The Appellate Division erred in directing final judgment. (*Ross v. Caywood*, 162 N. Y. 260.) The Appellate Division erred in directing a reference. (*Doyle v. M. E. Ry. Co.*, 136 N. Y. 505.) The defendants own the building, and the covenant in the lease is express that they shall not be required to surrender until paid for their building. (*Matter of Coatsworth*, 160 N. Y. 114; *Van Rensselaer v. Penniman*, 6 Wend. 569; *Paine v. Rector, etc.*, 7 Hun, 89; *Smith v. Rector, etc.*, 107 N. Y. 620.) The defendants hold over as tenants at the rent reserved in the expiring lease. (*Holsman v. Abrams*, 2 Duer, 435; *Kelso v. Kelly*, 1 Daly, 419; *Smith v. Cooley*, 5 Daly, 401; *Ryder v. Jenny*, 2 Robt. 56; *Preston v. Hawley*, 101 N. Y. 586; 139 N. Y. 296; *Collyer v. Collyer*, 113 N. Y. 442; *Lamb v. Lamb*, 146 N. Y. 317; *Pickett v. Bartlett*, 107 N. Y. 277.) The defendants should not be charged with interest on the value of the use and occupation of the premises with which they are charged. (*Gray v. C. R. R. Co. of N. J.*, 157 N. Y. 483; *Myers v. Bolton*, 157 N. Y. 393.)

*William Mitchell* for respondents. The Supreme Court acting through the Appellate Division had the power to grant

the order of reference made herein. In case of failure of arbitrators to agree on valuations, or on an umpire, equity has jurisdiction to ascertain and determine the values, provided for in the lease, and the rights of the parties. (*Kelso v. Kelly*, 1 Daly, 419; *Wells v. Deseyen*, 1 Daly, 45; *R. P. D. Church v. Parkhurst*, 4 Bosw. 491; *Graham v. James*, 7 Robt. 468; *McAdam on Landl. & Ten.* [2d ed.] 166; *Story's Eq. Juris.* [13th ed.] 1457; *Const. of N. Y.* art. 6, § 2; *S. S. Bank v. S., C. & N. Y. R. R. Co.*, 88 N. Y. 110; *Cavanaugh v. Dooley*, 88 Mass. 66; *Schoonmaker v. Bonnie*, 51 Hun, 34; *Code Civ. Pro.* §§ 827, 1013, 1015; *Dunnell v. Ketaltas*, 16 Abb. Pr. 205.) The learned Appellate Division properly charged the defendants with the value of the use and occupation of the premises from the expiration of the lease. The defendants improperly delayed and prevented the arbitration proceeding. This being an equitable action, the relief demanded in the complaint is proper and the court might even go further and hold the defendants liable as trustees for the plaintiffs for the rent and full benefits received by the defendants since the expiration of the term. (*Code Civ. Pro.* § 2253; *Worrall v. Munn*, 38 N. Y. 137.) As the value of the use and occupation was a fixed market price which was liquidated and was undisputed on the trial, and as the defendants have been charged only with the actual rents received by the defendants from their sub-tenants with interest from the dates when the same were paid or payable, the interest was properly chargeable on the amount of rents received. (*Van Rensselaer v. Jewett*, 2 N. Y. 135; *Wilson v. City of Troy*, 135 N. Y. 96; *Sloan v. Baird*, 162 N. Y. 327.) The lessees were bound to quit and surrender on the 1st of March, 1895, pursuant to their express covenant. The payment to a lessee for improvements is not a condition precedent to surrender of possession. (*Tallman v. Coffin*, 4 N. Y. 134; *Matter of Coatsworth*, 160 N. Y. 122.)

MARTIN, J. That the learned Appellate Division was not justified in reversing the judgment of the trial court without

awarding the defendants a new trial upon all the issues in the action is thoroughly established by the decisions of this court. (*Moffet v. Sackett*, 18 N. Y. 522; *Cuff v. Dorland*, 57 N. Y. 560; *Whitehead v. Kennedy*, 69 N. Y. 462; *Andrews v. Tyng*, 94 N. Y. 16; *Lawrence v. Church*, 128 N. Y. 324; *Porter v. Dunn*, 131 N. Y. 314; *Altman v. Hofeller*, 152 N. Y. 498; *Heller v. Cohen*, 154 N. Y. 299; *Benedict v. Arnoux*, 154 N. Y. 715, 724; *Snyder v. Seaman*, 157 N. Y. 449; *New v. Village of New Rochelle*, 158 N. Y. 41; *Matter of Chapman*, 162 N. Y. 456, 459.)

Instead of granting a new trial, to which the defendants were clearly entitled, that court made an order appointing a referee to take certain proof and report it to the Special Term, and then directed that a final judgment should be entered thereon. Without examining in further detail the practice adopted in this case, it is sufficient to say that it was wholly unauthorized and irregular, and must be set aside. We have so often and so recently discussed the absence of authority in the Appellate Division to grant similar orders or judgments, that any further discussion of the subject would be a work of supererogation.

There is, however, a more serious impediment to the affirmation of either of the judgments of the Appellate Division, arising from the fact that the first judgment of the Special Term was reversed upon questions of law only. The order of reversal contains no statement that the judgment was reversed upon the facts, and, hence, under the mandate of section 1338 of the Code of Civil Procedure, it must be presumed to have been reversed upon questions of law. (*People v. Adirondack R'way Co.*, 160 N. Y. 225; *Bomeisler v. Forster*, 154 N. Y. 229; *Petrie v. Trustees of Hamilton College*, 158 N. Y. 458; *Gannon v. McGuire*, 160 N. Y. 476; *Lannon v. Lynch*, 160 N. Y. 483; *Schryer v. Fenton*, 162 N. Y. 444; *Spellman v. Looschen*, 162 N. Y. 268.)

The trial court was plainly of the opinion that the proof disclosed such a lack of diligence or effort upon the part of the plaintiffs to procure a valuation of the premises and building in the manner prescribed by the lease as to prevent them from

maintaining this action, and for that reason dismissed the complaint. It is equally manifest that the learned Appellate Division was of the opinion that, upon the facts, the complaint should not have been dismissed, and upon that ground reversed the judgment. An examination of the evidence taken upon the first trial renders it obvious that there was sufficient testimony to justify the Special Term in finding that the plaintiffs were guilty of such inaction and negligence upon their part as to prevent the proper maintenance of this action. The plaintiffs were not entitled to the relief sought, unless the defendants were guilty of some improper act or omission to proceed with the arbitration, or to agree upon the value of the property in the manner provided by the lease, especially if there was such neglect upon the part of the plaintiffs as is indicated by the evidence and determination of the Special Term. It was the duty of each party to act in good faith to accomplish the appraisement in the manner specified. (*Livingston v. Sage*, 95 N. Y. 289; *Hood v. Hartshorn*, 100 Mass. 117; *Kelso v. Kelly*, 1 Daly, 419; *Uhrig v. Williamsburgh City F. Ins. Co.*, 101 N. Y. 362.)

While it may be that as the Appellate Division had the right to review the first judgment, both as to the law and facts, it might have properly reversed it upon the facts, still, not having done so, its judgment of reversal cannot be sustained, unless the decision of the Special Term was without any evidence to support it, and, hence, a reversal upon the law was justified. An examination of the record renders it manifest that it could not be properly held, as a matter of law, that the Special Term was not authorized by the proof before it to dismiss the complaint upon the ground stated. Therefore, the learned Appellate Division erred in reversing the first judgment upon the law, and its judgment must be reversed and the judgment of the Special Term affirmed, unless this court acts upon the consent or stipulation of the defendants' attorney, made upon the argument.

The attorney for the appellants, during the argument, consented that if this court should be of the opinion that the



principle adopted in appraising the value of their building was correct, the judgment might be so modified in other particulars as to conform to the law and proper practice, and as thus modified might be affirmed. We have carefully examined that branch of the case which relates to the appraisal and valuation of the interests of the parties in the premises, and are of the opinion that the appraisals were correct both as to the value of the land and as to the value of the building thereon.

But the judgment of the court below is erroneous in other respects, and must be reversed and the first judgment of the Special Term affirmed, unless the respondents shall stipulate to modify the judgment of the Appellate Division in the particulars pointed out. The court below erroneously charged the appellants eighty-three hundred dollars a year from March 1, 1895, to March 1, 1897, for the use and occupation of the premises, when the annual rent reserved in the lease was only one thousand dollars. In this connection it is to be observed that by the terms of the lease the defendants would not have been justified in surrendering or required to surrender possession until the plaintiffs elected either to renew the lease upon terms agreed upon or adjusted, or to purchase the building at a price agreed upon or settled in the manner specified. Such is the plain reading of the lease, and such was the clear intention of the parties making it. Therefore, it is obvious that the defendants could not properly surrender possession until the value of the lot and building was agreed upon or thus determined, nor until the plaintiffs made their election. The plaintiffs at no time indicated any willingness to accept the possession or in any way consented to a surrender thereof by the defendants. We think the continuance of the defendants in possession of the premises must be regarded as under the lease until such time as the plaintiffs actually made their election, which was not until after the second judgment was rendered. Where a lease for a term of years contains a covenant on the part of the lessor that at the expiration of the term the lessee shall be paid the appraised value of the building, or a new lease at an appraised rent shall

be granted, the lessee at the expiration of the term is entitled to retain the possession until the covenant shall be performed by the lessor. This binds both the lessor and lessee. The lessee is not, however, discharged from the payment of the rent, but in an action for use and occupation the lessor can recover no more than the rent originally reserved. (*Holsman v. Abrams*, 2 Duer, 435; *Ryder v. Jenny*, 2 Robertson, 56; *Paine v. Rector, etc.*, 7 Hun, 91; *Van Rensselaer v. Penniman*, 6 Wend. 569.)

Instead of being charged \$8,300 a year the defendants should have been required to pay only the annual rent of one thousand dollars reserved by the lease. Therefore, the judgment should be modified by deducting from the amount allowed to the plaintiffs for the use of the premises the sum of \$15,627.41, the interest thereon amounting to \$161.58, and the costs and disbursements allowed against the plaintiffs amounting to \$616.15, making a total of \$16,405.14 which should be deducted from the amount credited to the plaintiffs; that the defendants should be allowed for the value of their building \$15,100, but the amount credited to them for taxes should be disallowed, and the rent for the two years the premises were occupied by them should be deducted from the value of the building, leaving their due therefor, after deducting the rent, the sum of \$13,100.

It follows that the judgment of the Appellate Division reversing the first judgment of the Special Term should be reversed, the subsequent proceedings and judgment set aside, and the said judgment of the Special Term affirmed, with costs to the defendants of all the proceedings in all the courts, unless the plaintiffs stipulate to modify the judgment appealed from so as to direct that the plaintiffs pay to the defendants \$13,100, with interest thereon from March 1, 1897, with costs to the defendants in all the courts. If they shall so stipulate, then the judgment appealed from should be modified in accordance with such stipulation and, as so modified, affirmed.

PARKER, Ch. J., GRAY, BARTLETT, VANN, CULLEN and WERNER, JJ., concur.

Judgment accordingly.

HELEN SILVER, Respondent, v. THE WESTERN ASSURANCE COMPANY OF TORONTO, CANADA, Appellant.

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169	310

**FIRE INSURANCE — COMPLIANCE WITH AGREEMENT FOR APPRAISAL A CONDITION PRECEDENT TO ACTION UPON POLICY.** Where, in pursuance of the provisions of the standard fire insurance policy, the parties have entered into a written agreement to submit to appraisers the amount of a loss, both parties are equally bound to act in good faith to accomplish the appraisement, and where the insured, beyond the appointment of an appraiser, has taken no steps to render it effective and there is no evidence that the insurer, either in the execution of the agreement or for the purpose of defeating its object, has acted in bad faith, the former will not be absolved from compliance with its terms and justified in abandoning the proceedings and resorting to an action to recover the amount of the loss.

*Silver v. Western Assur. Co.*, 88 App. Div. 450, reversed.

(Argued October 15, 1900; decided October 30, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered October 31, 1898, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*George A. Stearns* for appellant. As a matter of law the defendant did not waive the right to an arbitration. (*Vandergriff v. C. E. Co.*, 161 N. Y. 435; *De Witt v. A. Ins. Co.*, 157 N. Y. 353; *Ronald v. M. R. F. L. Assur. Co.*, 132 N. Y. 378; *Underwood v. F. J. S. Ins. Co.*, 57 N. Y. 500; *Allen v. G. A. Ins. Co.*, 123 N. Y. 12; *Decker v. Sexton*, 19 Misc. Rep. 59; *Bogardus v. N. Y. L. Ins. Co.*, 101 N. Y. 328; *Diehl v. A. C. M. Ins. Co.*, 58 Penn. St. 443; *Beatty v. L. C. M. Ins. Co.*, 66 Penn. St. 9; *Findeisen v. M. F. Ins. Co.*, 57 Vt. 520.) The requirement of the policy that the amount of loss or damage should be ascertained either by agreement between the parties or by an appraisal as therein provided, was a condition precedent to the right of action.

(*D. & H. C. Co. v. P. C. Co.*, 50 N. Y. 250; *Seward v. City of Rochester*, 109 N. Y. 164; *Scott v. Avery*, 5 H. L. Cas. 811; *Davenport v. L. I. Ins. Co.*, 10 Daly, 535; *Richards on Ins.* [2d ed.] 182; *U. S. v. Robeson*, 9 Pet. 319.) At the opening of the trial, and before any evidence was taken, the defendant moved to dismiss the complaint on the ground that the facts stated did not constitute a cause of action. The motion should have been granted. (*Tooker v. Arnoux*, 76 N. Y. 397; *Southwick v. F. Nat. Bank*, 84 N. Y. 420; *Pope v. T. H. C. Co.*, 107 N. Y. 61; *Thomas v. Van Ness*, 4 Wend. 549; *Austin v. N. Ins. Co.*, 16 App. Div. 86; *Reining v. City of Buffalo*, 102 N. Y. 308; *Carroll v. G. F. Ins. Co.*, 72 Cal. 297; *G. A. Ins. Co. v. Etherton*, 25 Neb. 507.)

*Abraham H. Sarasohn* for respondent. The evidence and circumstances in this case fully justified the trial justice's decision denying defendant's motion to dismiss the complaint on the ground that there had been no appraisal, and holding as a matter of law that the evidence sufficiently shows a waiver of appraisal by the insurance company defendant, there being no dispute or question as to the facts constituting such waiver. (*Uhrig v. W. C. F. Ins. Co.*, 101 N. Y. 362; *Gee v. C. B. Ins. Co.*, 67 Iowa, 217; *Tillie v. C. Ins. Co.*, 86 Va. 811; *P. D. G. Co. v. I. F. Ins. Co.*, 51 N. W. Rep. 123; *Zimerisky v. O. F. Ins. Co.*, 52 N. W. Rep. 55.) The clause in the fire insurance policy regarding an appraisal on arbitration is not a condition precedent in an action to recover on the policy. (*Gibbs v. C. Ins. Co.*, 13 Hun, 611; *Lawrence v. N. F. Ins. Co.*, 73 N. Y. S. R. 398; *Mark v. N. Ins. Co.*, 24 Hun, 565.)

PARKER, Ch. J. The action is upon a standard insurance policy to recover for damages sustained by fire. In pursuance of one of the provisions of the policy the parties entered into a written agreement to submit to appraisers the fixing of the amount of damages sustained by the assured, but before the appraisers acted this action was commenced.

The defendant's answer alleged as a defense that notwithstanding its demand for an appraisal of the loss, none had been made at the time of the commencement of the action, and both at the close of the plaintiff's case and of the whole case, defendant asked for a dismissal of the complaint on that ground, and exceptions taken to the refusals of the court to dismiss present the only question we need consider.

The learned counsel for the plaintiff admits that compliance with the requirement of the policy that the amount of loss or damage should be ascertained either by agreement between the parties or by an appraisal would, under ordinary circumstances, constitute a condition precedent to the right of action, but contends that the facts of this case bring it within the doctrine of *Uhrig v. Williamsburgh City Fire Insurance Co.* (101 N. Y. 362), where it is held that under an arbitration clause in a policy of fire insurance it is the duty of the parties to the contract to act in good faith to accomplish the appraisement in the way provided, and if either acts in bad faith so as to baffle the real object of the clause, the other is absolved from compliance therewith. An examination of the facts, as stated in the opinion in the *Uhrig* case, discloses that the parties agreed upon an arbitration, and the arbitrators having failed to agree, the plaintiff requested the defendant to appoint another arbitrator, or agree with one selected by the plaintiff in appointing an umpire, so that an appraisement could be effected, but that his request was not complied with; and later the defendant served upon the plaintiff another written request to arbitrate, and offered to select a person to appraise the damages upon its part, and the court said: "The plaintiff had entered into an arbitration and was not bound to enter into a new one while that was pending, and if that one failed from the fault of the defendant, he had discharged his whole duty under the arbitration clause, and was not bound to enter into a new arbitration agreement." And further said: "There was some evidence tending to show, and from which a jury might have inferred, that the defendant was not acting in good faith to procure a speedy appraisal, and was inter-

posing this clause in the policy for the purpose of forcing a compromise from the plaintiff."

The contention of the plaintiff in this case is that the evidence is of such a character as to support a finding by the jury that the defendant was acting in bad faith, with the purpose of defeating the real object of the clause; that, therefore, the plaintiff is absolved from compliance with it, and hence that the refusal to dismiss the complaint was not error. The arbitration agreement was signed by both parties, and by it Jacob Jacobson was appointed appraiser on the nomination of the plaintiff, and Adolph Friedman on behalf of defendant, the agreement bearing the date of December 14th, 1895. From that date until the 28th day of January following, at which time this action was commenced, it does not appear that the plaintiff, his appraiser or his attorney took any action whatever looking to the making of the appraisal for which the agreement undertook to provide. The defendant's appraiser and attorney seem to have taken all the steps that were taken towards bringing about an appraisal. On January 6th Adolph Friedman, defendant's appraiser, addressed to the plaintiff at the place where the fire occurred a registered letter, but it was returned, having stamped across the face of it in red ink: "Returned to sender; cannot be found by N. Y. P. O. Jan. 9, 1896." It also bore in writing the words: "Removed, No address W. R. 164." A few days later and on January 14th defendant's attorney sent a letter to the plaintiff's attorney in which he stated that he was informed that the address of plaintiff's appraiser was not given in the agreement, and that the defendant's appraiser had addressed to him a registered letter in the care of plaintiff at the last known address of the latter, but that it had been returned, and the letter concluded with the request: "Will you kindly advise me where Mr. Bass' appraiser can be reached and oblige, \* \* \*." Two days later the plaintiff's attorney replied to this letter as follows:

"The address of Mr. Jacob Jacobson, the appraiser designated by my client, Abraham Bass, is No. 1 Market street,

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this city, and I believe is so stated in the agreement for appraisal executed by my client.

"Mr. Bass informs me that no registered letter was received by him from Mr. Friedman; and, as he has not changed his address, I doubt if any has ever been sent."

In view of the fact already mentioned, that no one on behalf of the plaintiff ever took any action toward hastening the appraisement provided for by the agreement, the apparent indignation of this letter would be difficult to account for were it not that the record discloses that the attorney was mistaken when he stated his belief that his client's appraiser's address was stated in the agreement and also in his expression of doubt as to whether any letter had been sent to the former address of Mr. Bass. The appraisal agreement is in the record, and while it gives the name of the plaintiff's appraiser, it does not give his address, and the envelope which was put in evidence and to which reference has already been made, shows that his doubt as to whether any such letter had ever been sent was not well founded.

No evidence has been given tending to show that the defendant was not acting in good faith when it executed the agreement for appraisement. There was a delay of some days, covering in part the Christmas holidays, after the agreement was executed, before defendant's appraiser undertook to get in communication with the plaintiff's appraiser, but it does not appear that this delay was prompted by or known to the defendant. On the other hand, there was still greater delay on the part of the plaintiff's appraiser, upon whom rested precisely the same measure of obligation to proceed promptly with the appraisement as devolved upon the defendant's appraiser. Not only did the plaintiff's appraiser omit, then or later, to perform the duties of an appraiser, but the plaintiff also seems to have omitted suggesting to his appraiser, to the defendant, or to its appraiser, that expedition was desired for any reason. It is the "duty of *each party* to act in good faith to accomplish the appraisement," said the court in the *Uhrig Case* (*supra*), *i. e.*, it is just as much the duty of one party as of the other,

and, hence, it is difficult to discover the logic of the contention that the assured and his appraiser could sit still from the time of making the agreement until the commencement of the action, and then deprive the other party, whose appraiser and attorney did take some action towards carrying out the agreement, of the benefit of the agreement on the ground that its object had not been made effective by an appraisement.

We think there was no evidence upon which the jury could base a finding that the plaintiff should be absolved from compliance with the agreement to appraise because the defendant in bad faith sought to defeat the real object of the provision in the policy providing for an appraisement of damages.

The judgment should be reversed and a new trial granted, with costs to abide the event.

GRAY, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ., concur.

Judgment reversed, etc.

JOSEPH F. SINNOTT, Individually and as Surviving Partner of  
ANDREW F. MOORE, Deceased, Appellant, v. THE GERMAN-  
AMERICAN BANK OF ROCHESTER, Respondent, Impleaded  
with Another.

1. SALES—RESCISSION—FACTS INSUFFICIENT TO ESTABLISH FRAUD. The insolvency of a vendee, coupled with the fact that he had carried on business for many years upon capital obtained from a bank upon forged commercial paper, does not negative the inference of an honest intention upon his part to pay for goods purchased, and will not entitle the vendor to rescind the sale upon the ground of fraud and reclaim the goods from the bank, which has subsequently obtained possession of them under circumstances constituting it a *bona fide* purchaser.

2. UNLAWFUL USE OF DESIGNATION “& Co.”—PENAL CODE, § 363. Where the vendee has no actual partner or partners, the use of the designation “& Co.” in the transaction of his business, in violation of section 363 of the Penal Code, making such use a misdemeanor, could have no operation in the case of an executed agreement. The statute is highly penal and should be strictly construed.

*Moore v. German-American Bank*, 83 App. Div. 641, affirmed.

(Argued October 16, 1900; decided October 30, 1900.)

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s165	646
164	386
j173	547
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Statement of case.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 10, 1898, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term, and an order denying a motion for a new trial.

This was an action for the recovery of certain barrels of whisky, which, as it was alleged, were wrongfully detained from the plaintiffs by the defendant. The following are the material facts, as disclosed by the record: In 1896 Feiock was, and he had been for some years, engaged in the business of buying and selling wines, liquors, groceries, etc., in the city of Rochester, under the firm name and style of "B. Feiock & Co." He had been a customer of the plaintiffs, wholesale whisky dealers, for some years past, and in the months of March and May, 1896, they sold and delivered to him some barrels of whisky on credit. At the time, Feiock was indebted to the defendant bank, upon commercial paper discounted by it for him, to the amount of upwards of \$25,000. The bank, suspecting that some of the discounted notes were forgeries, called upon him to take up his line of discounted paper and to give his demand note for the amount of his indebtedness. The note was given by Feiock and the bank surrendered to him all of the discounted notes. It commenced suit upon the demand note and judgment was consented to in the action. Execution was issued, a levy was made upon Feiock's property and a sale was had, at which the whole stock of goods was bid in by the bank for the sum of \$5,000. It appeared that at the time of the transaction with the plaintiffs, Feiock's indebtedness to the bank and to other creditors, who included members of his family, exceeded the amount of his assets. It, also, appeared that the capital upon which Feiock had been carrying on his business for many years was procured by discounting forged commercial paper. The plaintiffs, claiming that Feiock had obtained the whisky from them by fraud, demanded of the bank the possession and return of the goods and, upon a refusal, brought this action. At the conclusion

of the plaintiffs' case, the trial judge dismissed the complaint upon the ground that no cause of action was made out against the bank. Upon appeal the Appellate Division in the fourth department affirmed the judgment in defendant's favor and the plaintiff now appeals to this court.

*Frank J. Hone* for appellant. One who purchases goods on credit with the intention not to pay for them is guilty of fraud and the sale can be rescinded at the option of the seller. In such a sale title passes back and goods can be taken in replevin unless they have passed into the possession of a *bona fide* holder for value. (*Devoe v. Brandt*, 53 N. Y. 462; *Coursey v. Morton*, 132 N. Y. 556; *Anonymous*, 67 N. Y. 508; *Stallcup v. Bank*, 6 N. Y. S. R. 512.) The contract of sale by plaintiffs to Feiock was void or voidable because of Feiock's unlawful use of the firm name "B. Feiock & Co." It was unenforceable as far as Feiock was concerned. It was voidable at the election of plaintiffs. On rescission by plaintiffs no title passed and plaintiffs had the right to replevin. (*Swords v. Owens*, 43 How. Pr. 176; *Barron v. Yost*, 35 N. Y. S. R. 380; *Hallett v. Novion*, 14 Johns. 290; *Wood v. E. Ry. Co.*, 72 N. Y. 196; *Ryan v. Hardy*, 26 Hun, 176; *Gay v. Seibold*, 97 N. Y. 472.) Any false representations which were material to credit and on which credit was actually based, would be fraud which would give plaintiffs, on discovering, the right to avoid the contract. Feiock did make false representations which were material to credit and on which credit was actually based. (*Arthur v. Griswold*, 55 N. Y. 400.) Feiock's suppression of the facts concerning his financial condition was a fraud on plaintiffs. (*Rothmiller v. Stein*, 143 N. Y. 581; *Hotchkiss v. T. Nat. Bank*, 127 N. Y. 329; *Brown v. Montgomery*, 20 N. Y. 287; *Nichols v. Pinner*, 18 N. Y. 295; *Devoe v. Brandt*, 53 N. Y. 462.)

*George F. Yeoman* for respondent. In order to avoid a sale the intent not to pay must exist when the property is purchased, and without proof of such an intent a judgment for the

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plaintiff cannot be sustained. (*Hotchkiss v. I. Nat. Bank*, 127 N. Y. 329.) The fact that Feiock was violating a statute in doing business alone during the period in question under the name of "B. Feiock & Co.," does not give the plaintiffs an election to treat as void executed contracts which they had made with him. (*Kennedy v. Budd*, 5 App. Div. 140; *Barron v. Yost*, 35 N. Y. S. R. 380; *Gay v. Siebold*, 97 N. Y. 472; *Taylor v. Bell & Co.*, 18 App. Div. 173; *Wood v. E. Ry. Co.*, 72 N. Y. 198; *Swords v. Owen*, 43 How. Pr. 176.) The bank was a *bona fide* purchaser of the whisky and was innocent of any knowledge of a fraud in Feiock's purchases, if any existed. (Benj. on Sales, § 649; *Root v. French*, 13 Wend. 570; *Park Bank v. Watson*, 42 N. Y. 490; *Carey v. White*, 52 N. Y. 138; *Barnard v. Campbell*, 55 N. Y. 456; *Stevens v. Brennan*, 79 N. Y. 254.)

GRAY, J. The appellant claims that the character of the financial transactions between Feiock and the bank was such as to negative the inference of an honest intention upon Feiock's part to pay for the goods which he had purchased of the plaintiffs and that, therefore, they were entitled, for the fraud practiced, to rescind the sale and to repossess themselves of the goods sold, as they had not passed into the possession of a *bona fide* purchaser. It is conceded that Feiock's insolvency, alone, furnished no inference of an intention not to pay for the goods. The testimony was that he did intend to pay; but it is argued that the circumstances were such, and that the nature of the insolvency was so affected by his relations to the bank, as to furnish the legal conclusion that the intention and reasonable expectation of the ability to pay did not exist. No case is cited in support of the plaintiffs' position and I do not think that any can be found in the books. I do not think it can find support in any legal principle. Feiock was under no obligation to communicate to persons dealing with him the extent and nature of his transactions with others. The presumption was that, having procured the capital upon which to carry on his business, he would use it

in the discharge of his current obligations, with the reasonable expectation that the business would prove profitable enough to satisfy, eventually, what indebtedness had been incurred. Whether in the procuring of his capital his conduct was fraudulent; whether his schemes rendered him amenable to legal punishment were not matters, of which it could be predicated that they evidenced an intention on his part not to pay for goods purchased in the conduct of the business. His purpose was to continue his business. It might be abortive, or liable to defeat by reason of his fraud in raising moneys for capital; but not only there might be, but there would be, the clear intention to pay for goods purchased. The indebtedness to the bank was a fact. How it arose, or whatever Feiock's conduct towards it, they were matters between themselves; the disclosure of which he was not bound to volunteer to others with whom he might have dealings. It is an untenable proposition, in my opinion, that the guilt of Feiock's conduct in his transactions with the bank made his subsequent purchases from the plaintiffs voidable at their election. Without their inquiry, it was immaterial, so far as they were concerned, how he had procured the capital with which he was carrying on the business.

The proposition is clear that the bank was a *bona fide* purchaser of the whisky. If there was any fraud in the transaction of this purchase by Feiock from the plaintiffs, the bank had no knowledge of it. At the time of taking the demand note, upon which judgment was recovered for the amount of the existing indebtedness to the bank, the latter gave up to Feiock the good notes which it held, as well as the forged notes, and at the execution sale it bought in the property which had been levied upon. Under these circumstances, the bank became the purchaser and holder in good faith of the whisky in question, within the rules of law.

It is further claimed by the plaintiffs that the use by Feiock of the firm name and style of "B. Feiock & Co." was unlawful and had the effect of making the transaction of sale between them voidable at their election. This contention has reference

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to the statute, which makes it a misdemeanor for a person who transacts business to use the designation "& Company," or "& Co.," when no actual partner or partners are represented thereby. (Penal Code, section 363.) I think this contention is, also, quite untenable. If we might assume that the violation by Feiock of the statute disabled him from enforcing the performance of any executory contract, that was not this case. This was an executed agreement and it is inconceivable that, in such a case, the statute should have any operation. It is a highly penal one and deserves a strict construction. (*Gay v. Seibold*, 97 N. Y. 472.) It was a measure intended to be in the interests of the commercial community and had its foundation in public policy. It simply made it a misdemeanor to do what was therein specified and that is all. To extend its operation as far as the plaintiffs would have it, would be to give a construction to it which would permit of its injurious operation upon persons whose dealings with the guilty party have been in good faith. Such a construction would be foreign to the purpose of the enactment; contrary to public policy and without support in legal principles.

For these reasons I think that the judgment should be affirmed, with costs.

BARTLETT and VANN, JJ. (dissenting). The appellant's counsel states that insolvency alone is not urged as evidence of intention not to pay, for a man may be insolvent, that is, he may owe more than he has assets to pay, and yet honestly expect to tide over and finally make up the deficiency.

We here have insolvency, coupled with a condition of affairs that is unique in the history of business.

Feiock was transacting business on the proceeds of forged paper and renewals of the same which he had discounted at the defendant bank.

When it was discovered that certain of this paper was forged, the bank compelled Feiock to give his demand note for the full amount of his indebtedness, and at once commenced suit on the note, taking judgment under an offer, and

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appropriated by sale all the assets of the debtor except certain notes turned over to his wife.

Feiock's indebtedness to the bank was about \$25,000. This amount was represented by some \$20,000 of forged paper which Feiock destroyed when it was taken up and \$4,600 in notes, said to have been genuine, turned over to his wife.

It is conceded that the basis on which Feiock transacted his business was the proceeds of these felonies and that he could only hope to continue in trade so long as he was not discovered.

It also appears that this is the second time he had been compelled to close out business by reason of similar methods, carried on with another Rochester bank.

The defendant bank discovered these forgeries about the 10th of June, 1896, the plaintiffs sold their goods to Feiock in the months of March and May, 1896, and they were taken under the bank's levy.

It is now urged that Feiock, doing business under these conditions, could purchase goods, having an honest intention to pay for them, and that the transaction is free from fraud.

It was stated by counsel on the argument that no case could be found in the books holding that such a purchase of goods was fraudulent.

The statement may be true, as it is quite probable that this is the first time the court has been confronted by such a proposition.

We are of opinion that a man conducting business, the sole basis of which is the floating of forged paper and its renewals in his bank, is in a situation where he cannot entertain the honest intention to pay his debts, and that all his purchases of goods are fraudulent.

PARKER, Ch. J., MARTIN, CULLEN and WERNER, JJ., concur with GRAY, J., for affirmance.

BARTLETT and VANN, JJ., dissent in memorandum.

Judgment affirmed.

In the Matter of the Objections to the Certificates of Nomination of JOSEPH P. HENNESSY and RICHARD H. MITCHELL for State Senator for the Twenty-first Senatorial District.

JOSEPH P. HENNESSY, Appellant; RICHARD H. MITCHELL, Respondent.

1. ELECTION LAW — SECTION 56 DIRECTORY NOT MANDATORY. The provision of the Election Law (L. 1896, ch. 909, § 56, as amd. L. 1898, ch. 835) that a final order of the court reviewing the determinations and acts of the officers with whom certificates of nomination are filed must be made on or before the last day fixed for filing certificates of nominations to fill vacancies, viz., fifteen days before election, is directory and not mandatory, and where the court has acquired jurisdiction and a case has been submitted within the time required by the statute, its order will be effectual although made after the expiration of such time.

2. DUTY OF COURTS TO RENDER SPEEDY DECISIONS. It is the duty of courts and judges entertaining proceedings under the statute to speedily decide the questions presented to them so that the various steps required by officers may be taken in time to permit the carrying into execution its provisions.

*Matter of Hennessy*, 54 App. Div. 180, reversed.

(Argued November 1, 1900; decided November 2, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered October 31, 1900, reversing an order of Special Term, reversing a determination of the police board of the city of New York, deciding that Richard H. Mitchell was regularly nominated as the Democratic candidate for state senator for the twenty-first senatorial district.

The facts, so far as material, are stated in the opinion.

*Samuel H. Ordway* and *Joseph J. Marrin* for appellant. The Supreme Court has power to decide this controversy within fifteen days of election. The provision of section 56 of the Election Law that "the final order must be made on or before the last day fixed for filing certificates of nomination to fill vacancies," is not mandatory, but merely directory. (Endlich on Interp. of Stat. §§ 436, 437; *Smith v. Jones*, 1 B. & A. 334; *Reg. v. Ingram*, 2 Salk. 593; *Wood v. Chapin*, 13 N. Y. 509; *Stewart v. Slater*, 6 Duer, 83; *Matter of E. C.*

*Bank*, 18 N. Y. 199; *McRoberts v. Winant*, 15 Abb. [N. S.] 210; *Matter of Emmet*, 150 N. Y. 538; *Cunningham v. Cassidy*, 17 N. Y. 276; *Wallace v. Feeley*, 61 How. Pr. 225; 88 N. Y. 646; *Jenkins v. Putnam*, 106 N. Y. 272.)

*John F. McIntyre* and *Arthur C. Butts* for respondent. The order of Special Term was not made and entered until the 26th day of October, 1900, and not having been made within the statutory limitations imposed by the Election Law, is of no effect. (*Matter of Emmet*, 150 N. Y. 538; *Suth. on Stat. Const.* §§ 237, 454, 456.)

HAIGHT, J. The few hours intervening between argument and rendering of decision prevent more than a brief discussion of the question presented by this appeal.

Two certificates of nomination for state senator for the twenty-first senatorial district were filed with the police board, both regular in form, one certifying that the appellant Hennessy was duly nominated as the Democratic candidate and the other certifying that the respondent Mitchell was regularly nominated for the office by that party. Each of the candidates filed objections to the certificate of his opponent. A hearing was had by the parties before the police board, which on the 22d day of October, 1900, rendered its decision in favor of the respondent Mitchell. On the same day Hennessy petitioned the Supreme Court to review the decision of the board pursuant to the provisions of section 56 of the Election Law and the matter was brought to a hearing on the afternoon of that day at Special Term where argument was had and the whole matter in the proceeding submitted by counsel for the respective parties, the court taking the papers and reserving decision until the 25th day of October, at which time an order was made reversing that of the police board and adjudging Hennessy to be the regularly nominated candidate of the Democratic party for the office of senator. The order so made by the Special Term was entered the next day, and from that order an appeal was taken to the Appellate Division, which court reversed the order of the Special Term and



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affirmed that of the police board. From that order an appeal was taken to this court.

It appears from the order that the Appellate Division reversed upon the law, not upon the facts. Indeed, it is apparent from the opinion that the court agreed with the Special Term as to the merits of the controversy, for it said at the close of its argument: "It is with regret that we are forced to reach this conclusion in this particular case, because it seems to us that great injustice has been done to the respondent Hennessy, which the court is powerless to redress."

The Appellate Division appears to have reached the conclusion that the Supreme Court had no power to render its decision or to make its order reversing the determination of the police board after the 22d day of October. We have carefully read the opinion of that court and are much impressed with the ability with which the question has been discussed, and yet we doubt the correctness of the conclusion reached.

The provisions of section 56 of the Election Law, so far as they are now material to be considered, are as follows: "The Supreme Court, or any justice thereof, within the judicial district, or any county judge within his county, shall have summary jurisdiction upon complaint of any citizen, to review the determination and acts of such officer, and to make such order in the premises as justice may require, but the final order must be made on or before the last day fixed for filing certificates of nominations to fill vacancies with such officer as provided in subdivision one of section sixty-six of this article. Such a complaint shall be heard upon such notice to such officer as the said court or justice or judge thereof shall direct." The first subdivision of section 66 provides that the certificate of nomination therein referred to "shall be filed in the office in which the original certificate was filed \* \* \* at least fifteen days before the election if filed with the county clerk or the police board of the city of New York, or the city clerk of any other city." The election this year takes place on the 6th day of November, and under the construction of the statute, as given by the Appellate Division, the 22d

day of October was the last day upon which an order of the court or a judge could be made and entered reviewing the action of the board of police. The view taken by that court appears to be that the legislature regarded time as the essential feature of the statute limiting the power of the court and that the provision must be regarded as mandatory. We have examined the various amendments of the statute which, it is claimed, indicate such an intent, but fail to find reasons which satisfy us that such was the legislative intent. An examination of the Election Law discloses various provisions which call upon the Supreme Court, or any justice thereof in the judicial district, or a county judge of the county, to revise, correct and reverse the action of officers who are charged with the duty of carrying its provisions into effect. It may revise the registration of electors. It may strike names from the registry or require names to be entered thereon which have been rejected. It may determine the names of candidates who are properly nominated, and in case of error or omission in the publication of the names or description of candidates for office in the sample or official ballot it may require the clerk or other officer or board charged with the duty of preparing the ballots to correct the errors. It is thus apparent that the legislature contemplated a review of the action of the election officers and a correction of the errors which they may have committed in the discharge of their duties under the statute and that this was regarded as one of the prominent and essential features of the law. If the construction of the statute given by the Appellate Division is to be adopted, then the statute utterly fails to be effective in one of its most important features. The statute requires the officer with whom the certificates of nomination are required to be filed to first decide between the conflicting claims of candidates before the Supreme Court is given the power to review. If the provisions of the statute with reference to time are to be regarded as mandatory, such officer has but to reserve his decision until such time as will leave less than fifteen days before the election in order to deprive the court

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of any jurisdiction to review his determination. Such, it appears to us, was not the intent of the legislature.

In construing statutes all the provisions thereof should be considered and so far as possible each provision harmonized with the other so as to give effect to the legislative intent and the purpose sought to be accomplished. In reaching this result courts will treat some provisions as mandatory and others as directory in order to give force and effect to them all.

As we have seen, these proceedings were instituted, argued and submitted by the respective parties to the Special Term on the 22d day of October. That day was concededly within the time in which the court had the power to entertain the proceeding. The court acquired jurisdiction of the parties and of the subject-matter. The only effect, therefore, that the limitation of the statute could have upon this proceeding was to require the court to make, file and enter its decision that day. A judge of a court is a public officer. Cooley, in his Constitutional Limitations, at page 75, states the rule, as settled by authority, that "Statutes directing the mode of proceeding by public officers are directory and are not regarded as essential to the validity of the proceedings themselves unless it be so declared in the statute." (*Juliand v. Rathbone*, 39 N. Y. 369; *Ex parte Heath*, 3 Hill, 42.) The old Code of Procedure, section 267, provided that upon a trial of a question of fact by the court its decision "*shall be \* \* \** filed with the clerk within twenty days after the court at which the trial took place." Here we have an express provision of the statute using the word "shall." The provision was as mandatory in form and substance as that under consideration and yet it was held to be directory merely. (*Stewart v. Slater*, 6 Duer, 83.) In the case of *Matter of Empire City Bank* (18 N. Y. 199, 220) the referee under the statute was required to report to the first Special Term that should sit after the expiration of six weeks from his appointment. The court, speaking with reference to the provision of the statute, says: "The time fixed for the performance of intermediate steps, after jurisdiction had been once acquired, should be regarded as directory

merely, and an omission to perform one or more of them in time would not render the whole proceeding abortive." In the case of *Wood v. Chapin* (13 N. Y. 509) it was held that the statute requiring an officer before whom proceedings were had against an absconding debtor to make and file his report within twenty days after the appointment of trustees was directory merely, and an omission to comply with its requirements within the prescribed time did not vitiate the proceedings. In *Rawson v. Parsons* (6 Mich. 401) the first error assigned arose under the statute requiring the decision of the court to be given before the first day of the term succeeding that in which the case was submitted. CHRISTIANOY, J., in delivering the opinion of the court, says: "We are all of opinion that this provision, as relates to the time within which the decision shall be given and filed, is directory merely. It imposes a duty upon the judge; but as the parties have no control over his action, it would be a harsh construction which should deprive them of the fruits of the litigation because the judge fails to decide by a particular day." As we have seen, the Special Term had acquired jurisdiction, the case had been submitted to the court within the time required by the statute. All that remained was for the court to render its decision. The statute requiring him to file his decision within a specified time must, therefore, under the authorities, be deemed directory merely.

*Matter of Emmet* (150 N. Y. 538), in so far as it has any bearing upon the question under consideration, is in accord with the views herein expressed.

It is the duty of courts and judges entertaining proceedings under this statute to speedily decide the questions presented to them so that the various steps required by officers may be taken in time to permit the carrying into execution its provisions.

The order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs.

PARKER, Ch. J., GRAY, O'BRIEN, LANDON, CULLEN and WERNER, JJ., concur.

Order reversed, etc.

GEORGE R. TAYLOR, Respondent, v. EDWARD SMITH, Appellant.

APPEAL — INTERMEDIATE ORDER — CODE CIV. PRO. §§ 999, 1816 — REMITTANCE OF CASE FOR CONSIDERATION BY APPELLATE DIVISION. An order denying a motion for a new trial upon the minutes upon the grounds specified in section 999 of the Code of Civil Procedure, is an intermediate order within the meaning of section 1816; and an order of the Appellate Division, striking out from a notice of appeal thereto a statement of appellant's intention to bring up for review the order denying the motion for a new trial, must be reversed and the case remitted to the Appellate Division to consider the questions brought up by the notice of appeal which were not passed upon by that court.

*Taylor v. Smith*, 24 App. Div. 519, reversed.

(Argued October 29, 1900; decided November 13, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 10, 1898, affirming a judgment in favor of plaintiff entered upon a verdict, and from an order of said Appellate Division entered January 10, 1898, striking from the notice of appeal the words "and it is the intention of the appellant herein to bring up for review before this Court the order denying appellant's motion for a new trial, dated and entered in the office of the clerk of the County of Erie on the 21st day of January, 1897, and the whole and every part thereof."

*Tracy C. Becker* for appellant. The judgment of affirmance below, and the order striking out from the notice of appeal to the Appellate Division the words declaring appellant's intention to bring up for review the order denying his motion for a new trial, should be reversed, and the proceedings remitted to the Appellate Division with directions that it should proceed to determine the question whether the verdict of the jury was contrary to the evidence. (Code Civ. Pro. § 1316; *Voisin v. C. M. Ins. Co.*, 123 N. Y. 120; *Thurber v. H. B., M. & F. R. R. Co.*, 60 N. Y. 328; *People v. Priori*, 163 N. Y. 99.)

*Moses Shire* for respondent.

PARKER, Ch. J. The jury having rendered a verdict in favor of the plaintiff on the trial of this action, defendant's counsel moved the court upon its minutes for a new trial on the grounds specified in section 999 of the Code, which motion was denied and an order to that effect entered. Subsequently judgment was entered, from which the defendant appealed to the Appellate Division, stating in the notice of appeal his intention "to bring up for review before this court the order denying appellant's motion for a new trial." The plaintiff moved that court to strike from the notice of appeal the statement therein of defendant's intention to bring up for review the order denying the motion for a new trial, and the court granted the motion, holding that the order was not intermediate within the meaning of section 1316 of the Code. In thus holding the court erred. (*Fox v. Matthiessen*, 155 N. Y. 177.)

It follows that the record presented questions which the Appellate Division should have passed upon and did not, and hence the order amending the notice of appeal should be reversed and the case remitted to the Appellate Division of the fourth department to consider the questions brought up by the notice of appeal that were not passed upon by that court.

This practice is sanctioned by *Matter of De Camp* (151 N. Y. 557) and *Fox v. Matthiessen* (*supra*).

The order should be reversed, with costs, and the record remitted to the Appellate Division.

GRAY, O'BRIEN, HAIGHT, LANDON, CULLEN and WERNER, JJ., concur.

Order reversed, etc.

JAMES V. CUMMINGS, Appellant, v. UNION BLUE STONE COMPANY, and ELIZABETH SWEENEY et al., Surviving Members of the Firm of E. SWEENEY & SONS, Respondents.

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CONTRACT—WHEN VOID, AS TENDING TO CREATE A MONOPOLY. An agreement, between the producers of nearly the whole product of a commodity known as Hudson river blue stone and of at least ninety per centum of the whole amount sold, and a company which engages to sell all the marketable stone produced by them for the ensuing six years at prices fixed by an association composed of such producers, and to apportion the sales in specified proportions between them, no sales to be made except through the company, is void as against public policy, in that it threatens a monopoly whereby trade in a useful article may be restrained and its price unreasonably enhanced.

*Cummings v. Union Blue Stone Co.*, 15 App. Div. 602, affirmed.

(Argued October 29, 1900; decided November 16, 1900.)

APPEAL from judgments of the Appellate Division of the Supreme Court in the second judicial department, entered July 30, 1897, and July 8, 1898, affirming judgments in favor of defendants entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Leopold Leo* and *Benjamin Yates* for appellant. Not every agreement in restraint of trade is unlawful; and whether the agreement at bar is in unlawful restraint of trade or not is a question of fact for a jury. It is not against public policy to insist upon a reasonable profit in place of a ruinous price. (*D. M. Co. v. Roeber*, 106 N. Y. 473; *Leslie v. Lorillard*, 110 N. Y. 519; *Vinegar Co. v. Foehrenbach*, 148 N. Y. 58; *People v. Milk Exchange*, 145 N. Y. 267; *Cohen v. B. & J. E. Co.*, 38 App. Div. 499; *Curran v. Galen*, 152 N. Y. 33; *People v. N. R. S. R. Co.*, 121 N. Y. 582.)

*A. T. Clearwater* for Union Blue Stone Company, respondent. The agreement is inimical to trade, its object

being to create a monopoly to control the market, to force the public to buy of its members alone, to fix and to raise prices. It was against public policy, was void, and no action can be maintained upon it. (*People v. Milk Exchange*, 145 N. Y. 267; *People v. Sheldon*, 139 N. Y. 251; *Judd v. Harrington*, 139 N. Y. 105; *Leonard v. Poole*, 114 N. Y. 371; *Arnot v. P. & E. C. Co.*, 68 N. Y. 558; *Saratoga Bank v. King*, 44 N. Y. 87; *Stanton v. Allen*, 5 Den. 434; *Hooker v. Vandewater*, 4 Den. 349; *People v. Fisher*, 14 Wend. 9; *Bartlett v. Smith*, 13 Fed. Rep. 263; *Cobb v. Prell*, 15 Fed. Rep. 744; *Irwin v. Willier*, 110 U. S. 499; *Roundtree v. Smith*, 108 U. S. 269.) The contract being illegal and void cannot be enforced. No action can be maintained upon it, and the courts will not aid in adjusting differences arising out of it, and requiring an investigation of the illegal transactions entering into it. (*S. C. Bank v. King*, 44 N. Y. 87; *Judd v. Harrington*, 139 N. Y. 105; *Leonard v. Poole*, 114 N. Y. 371; *Stanton v. Allen*, 5 Den. 434.)

*John F. Cloonan* for Elizabeth Sweeney et al., respondents. The contract, on which the plaintiff seeks to recover, is on its very face contrary to public policy, illegal and void. (L. 1892, ch. 688, § 7; L. 1899, ch. 690, § 1; *People v. Sheldon*, 139 N. Y. 251; *Leonard v. Poole*, 114 N. Y. 371; *People v. N. R. S. R. Co.*, 121 N. Y. 582; *People v. Milk Exchange*, 133 N. Y. 565; 145 N. Y. 267; *Judd v. Harrington*, 139 N. Y. 105; *Arnot v. P. & E. C. Co.*, 68 N. Y. 558.)

LANDON, J. The trial court, in directing a verdict for the defendants, held that the contract, for the alleged violation of which by the defendants the plaintiff sought to recover damages, was a combination to control the market of blue stone and the market price, and to increase the market price and maintain it at the increased price, and was, therefore, void.

The evidence was to the effect that in 1887 the plaintiff and fourteen other persons were the producers of nearly the whole



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product of Hudson river blue stone, and of at least ninety per centum of the whole amount of such stone sold in the New York market to customers in various states east of the Mississippi river; that their yearly sales amounted to upwards of \$1,500,000; that owing to competition among themselves their profits had for some time been practically nominal; that with the intent to increase their profits, and to secure to each of said producers such part of the sales as his usual production bore to the whole production, they entered into an agreement bearing date the 21st day of February, 1887, with the defendant the Union Blue Stone Company, and thereby agreed that the said company should act as their sales agent of all the marketable blue stone, manufactured and unmanufactured, which the market would take for the six years from that date at prices to be fixed by the Blue Stone Association, composed of the said producers, and to apportion the sales among the producers according to a schedule set forth in the contract, and to sell for no other parties, the producers agreeing to sell no stone except through such agent, and, acting as the Blue Stone Association, to fix the prices, and each to furnish, upon the request of the sales agent, his quota of stone as apportioned. This contract was observed by the parties for about three years. The prices were increased, the sales aggregated about \$1,500,000 per year, and the plaintiff's share of the profits was satisfactory to him. By the end of three years competition in other kinds of stone and in artificial stone had so far developed as to threaten, in the opinion of the greater part of the producers, not including the plaintiff, further successful operation under the contract, and they resolved to discontinue operations under it, with the result to the plaintiff that he took no further benefit under it. The plaintiff, meantime, had assigned his interest under the contract and certain blue stone and other property to the defendants Sweeney in consideration of their payment to him of ten per centum of their gross amount of sales under the contract. The plaintiff charges that the blue stone company and his assignees, the Sweeneys, combined together to

prevent any further delivery and sales upon his account under the contract, and thus deprived him of any further profit.

The plaintiff urges that it was a question of fact for the jury, and not of law for the court, whether the contract was simply to secure reasonable prices, or to extort from the public unreasonable prices. It may be conceded that one of its purposes was to enable the parties to obtain reasonable prices, but it gave them the power to fix arbitrary and unreasonable prices. The scope of the contract, and not the possible self-restraint of the parties to it, is the test of its validity. They could raise prices to what they supposed the market would bear, and as they expected to supply nearly the entire demand of the market, the temptation to extortion was unusually great.

The plaintiff cites the cases which permit the vendor to sell his business with or without his plant, and to agree with his vendee that he will not by competition or other acts do anything to injure what he sells. (*Diamond Match Co. v. Roeber*, 106 N. Y. 473; *Leslie v. Lorillard*, 110 N. Y. 519; *Tode v. Gross*, 127 N. Y. 480; *Hodge v. Sloan*, 107 N. Y. 244.) It may be conceded that the law, as now understood, restrains no one from selling his property, nor does it compel any one to continue a business which he can sell, or finds it to his interest to abandon; much less to continue it for any time or in any particular manner or place. However it may have been when trade was small, money scarce, opportunities and markets few, at present the public has little to fear from any individual renouncing his calling and business in favor of another, and seeking a new field of activity. Contracts between individuals to that effect are not in general restraint of trade. But the case before us is of a different kind. It is one of such a combination among many dealers as threatened a monopoly, with which the individual would be practically powerless to compete, and the many consumers who would be severally exposed and coerced would be either compelled to submit to its exactions, or to forego the purchase of the commodity of customary use needful to them, and but for this monopoly obtainable in the market at a reasonable price. The

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same evil principle pervades both large and small combinations ; all are alike offenders, differing in degree, but not in kind. And hence it is that contracts by which the parties to them combine for the purpose of creating a monopoly in restraint of trade, to prevent competition, to control and thus to limit production, to increase prices and maintain them are contrary to sound public policy and are void. (*People v. Sheldon*, 139 N. Y. 251 ; *People v. Milk Exchange*, 145 N. Y. 267 ; *Judd v. Harrington*, 139 N. Y. 105 ; *Leonard v. Poole*, 114 N. Y. 371 ; *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y. 558 ; *Stanton v. Allen*, 5 Denio, 434 ; *Hooker v. Vandewater*, 4 Denio, 349 ; *People v. Fisher*, 14 Wend. 9.)

It is urged that the rule is only applicable to articles of prime necessity. Cases of criminal conspiracies to commit any act "injurious to trade or commerce" (Penal Code, sec. 168 ; 2 R. S. 692, sec. 8, sub. 6) have been more frequent in commodities of prime necessity such as grain, meat, salt, milk, coal and the like, probably because such offenses are more flagrant and were punishable at the common law. We are not now reviewing a conviction for crime and need not inquire whether in any criminal element the case differs from *People v. Sheldon* (*supra*). The subject-matter of the contract before us is a useful commodity of a nature to be needful for many purposes. Without considering the question whether there are many articles of commerce which are in no proper sense necessities or even conveniences, but mere luxuries or appendages of vanity, a monopoly in which does not conflict with the spirit of any statute or with the sound public policy which the statute cited declares, it is clear that the blue stone in question is not within any of such classes. It is abundant in the foothills of the Catskill mountains and not found of equal quality elsewhere. When this contract was made there were many small producers who supplied it to these parties, but were themselves without means or facilities to reach the New York market. The stone had been for many years and still is in use for sidewalks, crossings, curbing and gutters in the eastern and southern cities of the United States, and in

the construction of bridges, fountains, basins, floors and for trimmings in the exterior walls of buildings and for various other purposes. Its fitness and serviceability for these purposes were shown, and the evidence also tended to show that in these respects it had no superior in the New York market. In a civil action prime necessity need not be shown. The parties to this contract controlled ninety per centum of a total product of about \$2,000,000 in value, marketed in New York city. Other kinds of stone were in competition with it, but it is plain that the customer who preferred this stone would be restricted in his reasonable rights, if constrained by a monopoly to pay an exorbitant price for it, or to accept another kind which he did not want.

The uncontradicted evidence left it clear that this contract was void for the reasons stated, and the trial court was right in so holding as a matter of law. The trial court was also right in holding that the plaintiff had made no proof of his special charge against these defendants of a fraudulent breach of the contract as to his alleged interest in it.

The judgments should be affirmed, with separate bills of costs.

GRAY, O'BRIEN, HAIGHT and WERNER, JJ., concur; PARKER, Ch. J., and CULLEN, J., not sitting.

Judgments affirmed.

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THE UNITED PRESS, Appellant, v. NEW YORK PRESS COMPANY, Limited, Respondent.

1. CONTRACT—INDEFINITENESS OF PRICE TO BE PAID FOR SERVICES. An executory contract in writing, attempting to provide over a period of years for the furnishing of news reports on each day at a price "not exceeding three hundred dollars during each and every week that said news report is received," is so indefinite as to the price to be paid as to preclude a recovery of substantial damages for its breach in refusing to receive the service; and the fact that the sum specified has been paid for a period of time is not an acknowledgment of an obligation to pay that amount during the whole contemplated life of the contract.

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Statement of case.

2. COSTS—EXTRA ALLOWANCE. Under section 3253 of the Code of Civil Procedure an additional allowance, not exceeding five per centum, to the prevailing party is a part of the costs of the action and may be allowed to the defendant where the plaintiff recovers less than fifty dollars.

*United Press v. N. Y. Press Co.*, 85 App. Div. 444, affirmed.

(Argued October 31, 1900; decided November 16, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 27, 1898, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

*William C. Davis* for appellant. Notwithstanding the language of the contract bound the defendant to pay a sum "not exceeding \$300 per week," the defendant, by paying that sum for a long period, without objection and with uniform regularity, bound itself by a practical construction of the contract to pay that sum during the life of the contract. (*Kennedy v. McKone*, 10 App. Div. 88.) The action is properly brought. The right of action for damages accrued immediately upon the breach of the contract by the defendant. (*Todd v. Gamble*, 67 Hun, 38; *Windmuller v. Pope*, 107 N. Y. 674; *Dingley v. Olar*, 11 Fed. Rep. 372.) The measure of damages is the contract price, less the cost of performance. (*Howard v. Daly*, 61 N. Y. 362; *Nichols v. S. Co.*, 137 N. Y. 471; *B. T. Co. v. M. Mfg. Co.*, 12 App. Div. 260; *Heroy v. F. de S. Co.*, 16 App. Div. 171; *Everson v. Powers*, 87 N. Y. 527.) Where parties to a contract have themselves given a practical construction to it, the courts will take into account such construction and give effect to it. (*Reading v. Gray*, 6 J. & S. 79; *Stokes v. Recknagel*, 6 J. & S. 368; *Van Buskirk v. Stow*, 42 Barb. 10; *Moses v. Bierking*, 31 N. Y. 462; *Hilleary v. S. R. H. G. Co.*, 4 Misc. Rep. 127.) The court erred in directing a verdict. (*Bagley v. Bowe*, 105 N. Y. 171.) The extra allowance granted to the defendant is unauthorized by law. (*Murray v. Robinson*, 9 Hun, 137; *Pinder v. Stoothoff*, 7 Abb. [N. S.] 433.)

*De Lancey Nicoll* and *John W. Boothby* for respondent. The agreement was so indefinite and uncertain that no action for a breach of it will lie. (*Buckmaster v. C. I. Co.*, 5 Daly, 313; *Campbell v. Jimenes*, 7 Misc. Rep. 77; *Harper v. Hassard*, 113 Mass. 187; *Peacock v. Cummings*, 46 Penn. St. 344; *Coffin v. Landis*, 46 Penn. St. 426; *Van Slyck v. B. Ins. Co.*, 115 Cal. 644; *Gates v. Fay*, 53 Mich. 181; *Wardell v. Williams*, 62 Mich. 50; *Dayton v. Stone*, 69 N. W. Rep. 515.) The plaintiff could in no event recover more than nominal damages. (*Todd v. Gamble*, 148 N. Y. 382.) The extra allowance of costs granted to the defendant was authorized by the provisions of the Code of Civil Procedure. (*Brady v. Durbrow*, 2 E. D. Smith, 78; *Landon v. Van Etten*, 57 Hun, 122; *S. S. G. Co. v. J. M. Co.*, 61 Hun, 336.)

GRAY, J. This action was brought to recover damages for the breach of a contract in writing entered into between the parties, wherein the plaintiff agreed to deliver to the defendant the night news report of the former for publication every morning in the city of New York and the defendant agreed to receive the said news report, "and to pay to the first party (the plaintiff) therefor a sum *not exceeding three hundred dollars during each and every week that said news report is received by the second party (the defendant)* until the first day of January in the year 1900, it being understood and agreed that said news report continue to be fully equal in quality and quantity to its present average standard." It was, also, further provided that the defendant "shall have the right to receive the said news report without interruption from and after the first day of January, in the year 1900, and the first party (the plaintiff) shall continue to deliver the same if required by the second party at a price which shall be fair and equitable to both of the parties hereto, provided that such price shall not be more than any other daily morning newspaper in the city of New York shall be required to pay to the first party for the same news report."

This contract was made in July, 1892, and the parties pro-

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ceeded under it until January 1st, 1894; the plaintiff furnishing its news report to the defendant and the defendant paying therefor the sum of \$300 in each week. A few days before January 1st, 1894, the defendant, through its manager, notified the plaintiff in a letter to cease sending the news report on the first of January, and that after that date it would not pay for the same. The letter, in which this notice was conveyed, contained the statement that it had become necessary to make a reduction in the cost of the defendant's news service and that the plaintiff had declined to make any concessions. In a brief correspondence, which ensued during the next few weeks, the subject of a concession in price was discussed between the parties; but nothing came of it. Thereupon the plaintiff brought this action and demanded judgment for damages in the sum of upwards of \$93,000, upon the basis of its right to \$300 a week from January 1st, 1894, to January 1st, 1900. The trial court denied a motion to dismiss the complaint; and, at the close of the plaintiff's case, the defendant offering no evidence, a verdict was directed for the plaintiff in the sum of six cents, upon the ground that there was a technical breach of the contract for which only nominal damages might be awarded. The judgment entered thereupon was affirmed by the Appellate Division, in the first department, and the plaintiff's appeal to this court presents this as the main question for our consideration; whether the contract was so indefinite, by reason of its failure to state the price to be paid by the defendant, as to preclude a recovery of substantial damages for its breach. The appellant claims that, inasmuch as the language of the contract bound the defendant to pay a sum "not exceeding \$300 a week," by paying that sum for a period of time, it had bound itself through a practical construction of the instrument and it is, also, argued that the contract should be construed as one "to recover the reasonable value of the news service for the unexpired term of the contract, less the cost of performance."

If this were a case where the contract of the parties was merely ambiguous in its terms, it might be permissible to

explain them by evidence of their acts and thus to show a practical construction; but the difficulty with this instrument lies deeper. It lacked support in one of its essential elements; in the absence of a statement of the price to be paid. That was a defect, which was radical in its nature and which was beyond the reach of oral evidence to supply; for, if the intention of the parties, in so essential a particular, cannot be ascertained from the instrument, neither the court, nor the jury, will be allowed to make an agreement for them upon the subject. It is elementary in the law that, for the validity of a contract, the promise, or the agreement, of the parties to it must be certain and explicit and that their full intention be ascertained to a reasonable degree of certainty. If an agreement must be neither vague, nor indefinite, and, if defective, parol proof cannot be resorted to. (1 Com Contracts, 3; 1 Chitty on Contracts, 92; *Elmore v. Cote*, 5 B. & C. 583; *Blagden v. Bradbear*, 12 Ves. 301; *Williams v. Morris*, 95 U. S. at p. 456; *Parkhurst v. Cortlandt*, 1 Johns. Ch. 273; *Stone v. Browning*, 6 Conn. 598-604.) The latter case is not parallel in its facts. The question arose whether there was a sufficient memorandum of the contract for the sale of the goods to satisfy the requirements of the Statute of Frauds, and a letter of the defendant was relied upon for the purpose. Judge RAPPAH held that it did not "state the price, or any of the terms of the contract. Those deficiencies cannot be supplied by oral evidence. All the essential parts of the contract are omitted by the writing. This objection, without others, is conclusive." The rules of evidence require oral testimony with reference to the understanding of the parties or to supply omissions, and permit it, only, when it is necessary to explain the meaning of some technical, or ambiguous language used. It will not permit it to vary the terms of the contract itself by inserting in the writing what is not there. (1 Greenl. Evid. secs. 275-277, 282; *Drake v. Seaman*, 97 N. Y. 230-236.) In *Drake v. Seaman*, (*supra*), where the question arose as to the sufficiency of the memo-

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randum of the parties' contract, in an action for its breach, Judge FINCH cites the language above given from Judge RAPALLO's opinion in *Stone v. Browning*, in support of the established rule that the Statute of Frauds requires that the memorandum contain all the material terms of the contract between the parties and that "it must show on its face what the whole agreement is so far as the same is executory, and remains to be performed, and rests upon unfulfilled promise."

This was an executory contract, which attempted to provide, over a period of years, for the furnishing of news reports on each day, with a figure stated as the limit which the price to be paid each week must not exceed. There is, thus, no rate of compensation, nor price fixed, at which the defendant was bound to take and pay for the news report, and the element of mutuality, in that respect, was wanting. It was nearly as defective, in that respect, as was the agreement in *Bromley v. Jefferies*, (2 Vernon, 415); where it was provided that the plaintiff should have a certain estate for £1,500 less than any other purchaser would give for it. The agreement was held to be objectionable for want of mutuality and as not obligating the plaintiff to take the estate at any price. In *Browne* on the Statute of Frauds there is a discussion upon the subject of the applicability of the Statute of Frauds in the case of an executory contract and, as to whether it should agree *Acebal v. Levy*, (10 Bingh. 376), and of *Ho* whether it should *ib.* 482), are referred to. (Sec. 377.) on the subsequent it was observed by Chief Justice TINDAL that anything remained uses of an executory contract of purchase and sale of the parties are altogether silent as to the enforceable instrument. The want of any agreement as to price, the past, for the news parties must have intended to sell in consideration of an obligation, may be a question of some of the whole contemplated life law makes that inference where *ATTERTON* observed at the the acceptance of the goods by that the parties recognized vent the injustice of the defendant, or indefinite, as to the price, paying for them. But it is the efforts to come to a mutual same reason applies to a contract upon the subject. The defend-

only, and where the goods are still in the possession, or under the control, of the seller." I do not think that the force of the doubt, which the chief justice expressed in *Acebal v. Levy*, was affected by his opinion shortly after expressed in *Hoadly v. M'Laine*. The facts of that case were such as, naturally, to take it out of the statute. That was an action against the defendant for not accepting, and paying for, a carriage made under his written order by the plaintiff. The question was whether, as the price was left uncertain, the statute applied to such an executory contract. It was observed by Chief Justice TINDAL that a contract for a sale of a commodity, in which the price is left uncertain, is, in law, a contract for what the goods shall be found to be reasonably worth, and he held, applying that principle to the case at bar, that, as it appeared that the defendant had written to the plaintiff, desiring that he would send his bill for the carriage and announcing his intention to have it out immediately, the facts showed that he knew he was to pay a reasonable charge when the article was made up, and that "taking the whole together there can be no doubt that there is a sufficient memorandum of the bargain." It is evident from his opinion, as it is from the other opinions, that the facts, in the subsequent writings and conduct of the defendant, were regarded as evidencing his undertaking to was relied upon *quantum valebat*. (See also *Goodman v.* that it did not N. 574.)

contract. Those to these authorities as, possibly, throwing doubt. All the essence of the discussion, and not as exactly applied by the writion before us is whether the contract of others, is conclusive of its legally complete character as would testimony with reference under it. For what had been furnished or to supply omissions, a defendant had paid. It merely takes necessary to explain the defendant no longer obligated to receive and pay in the language used. It will be seen that it could not be agreed upon. The contract itself by it, where work has been done, or there. (1 Greenl. Ev. recovery may be based upon *man*, 97 N. Y. 230-236., *valebant*; but, where a contract where the question arose as to it and requires performance

over a future period of time, as here, and it is silent as to the price which is to be paid to the plaintiff during its term, I do not think that it possesses binding force. As the parties had omitted to make the price a subject of covenant, in the nature of things, it would have to be the subject of future agreement, or stipulation, and, to use the language of the opinion in *Buckmaster v. Consumers' Ice Co.*, (5 Daly, 313), if the price each week was to be by future agreement, the contract was not legally binding on either party, as neither could be compelled to agree with the other.

In *Kennedy v. McKone*, (10 App. Div. 88), which is cited by the appellant, the contract of the plaintiff to do certain work for the defendant was fully executed and the plaintiff's action was to recover for the work which he had actually done. The contract was indefinite as to price and provided that it should not exceed \$1,500; but, as the work had been done upon the defendant's house, the court permitted the recovery of its reasonable value within the limit of the sum named. The case is not parallel. Here, the defendant had declined to be bound by the contract, or to take any further reports from the plaintiff thereafter.

The effect upon the instrument of its indefiniteness, or uncertainty, as to the price to be paid, was to make it operative only so long as the parties chose, and were able, to agree upon the price per week. In other words, whether it should have contractual force, would depend upon the subsequent agreement of the parties and, manifestly, if anything remained to be done by them, relating to the subject-matter of the contract, it was an incomplete and unenforceable instrument. The payment of \$300 each week in the past, for the news report furnished, was not an acknowledgment of an obligation to pay that amount during the whole contemplated life of the contract, as Mr. Justice PATTERSON observed at the Appellate Division. It is evident that the parties recognized their contract to be uncertain, or indefinite, as to the price, from their correspondence and the efforts to come to a mutual understanding and agreement upon the subject. The defend-

ant committed a technical breach of its agreement to receive the news reports from the defendant; but, because of the indefiniteness of the obligation, only nominal damages were recoverable. There was no price fixed by the contract and the defect could not be supplied by parol. There was lacking, therefore, any basis for establishing any measure of damages.

At the close of the trial an exception was taken to the granting of the defendant's motion for an extra allowance and it is now argued, in behalf of the plaintiff, that it was unauthorized by law. I think that no error was committed in this respect. The Code of Civil Procedure denies costs to the plaintiff, unless he recovers the sum of \$50, or more, (Sec. 3228), and provides, (Sec. 3229), that "the defendant is entitled to costs, of course, \* \* \* unless the plaintiff is entitled to costs." The provision which authorizes the granting of an additional allowance in difficult cases is contained in the chapter on costs, (Sec. 3253), and reads that "the court may also, in its discretion, award to any party a further sum \* \* \* in any action \* \* \* where a defense has been interposed, a sum not exceeding five per centum upon the sum recovered or claimed, or the value of the subject-matter involved." There is no limitation in this language to the party in whose favor the verdict, or the judgment, runs. The additional allowance is treated as a part of the costs of the action, to which a party becomes entitled. The defendant, here, by reason of the plaintiff's recovering less than \$50, was, in fact, the prevailing party, and became entitled to the costs of the action. (See *Landon v. Van Etten*, 57 Hun, 122; *Safety Steam Generator Company v. Dickson Mfg. Company*, 61 ib. 335.)

The judgment should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, HAIGHT, CULLEN and WERNER, JJ., concur; LANDON, J., dissents.

Judgment affirmed.

LIVINGSTON DISBROW, Respondent, v. WESTCHESTER HARDWOOD  
COMPANY, Appellant.

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1. DAMAGES — MEASURE OF, FOR CUTTING TIMBER RESULTING IN INJURY TO THE FREEHOLD. Where the defendant under a contract with the plaintiff was entitled to cut certain timber upon the premises of the latter, and unlawfully cuts other timber, both on land covered and land not covered by the contract, to the injury of the freehold, the measure of damages is the difference between the value of the land after defendant has cut the timber which it was entitled to cut and its value after all the unauthorized cutting.

2. SEPARATE RECOVERY FOR VALUE OF TIMBER CUT, ERRONEOUS. Where the cutting of timber from lands not embraced within the terms of the contract is an injury to the freehold and a recovery is had therefor, an additional recovery for the value of the timber cut cannot be upheld.

*Disbrow v. Westchester Hardwood Co.*, 17 App. Div. 810, reversed.

(Argued October 29, 1900; decided November 16, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 22, 1897, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought to restrain the defendant from cutting and felling any timber upon plaintiff's lands, and from removing therefrom any of the wood or timber previously cut and felled, except in accordance with the provisions of the contract hereinafter set forth, and to recover damages for the wrongful cutting and destruction of wood and timber not within the terms of said contract.

On the 9th of January, 1895, the plaintiff was the owner of certain lands situated in the town of New Rochelle, Westchester county, N. Y. The property consisted of two parcels, one of which was known as the Underhill farm and the other as the Disbrow farm homestead, comprising altogether about one hundred eighty-five acres. These lands contained about forty-six acres of woodland, a part of which is described

as "wood lot on homestead of L. Disbrow;" another as "wood lot on Underhill Farm;" a third designated as "pasture and small wood lot not sold;" and the fourth as "wood lot south of the orchard and immediately west of the southerly portion of the wood lot on the Underhill Farm."

On said 9th day of January, 1895, the plaintiff entered into a contract with the defendant, of which the following is a copy:

"For the consideration of one thousand dollars (\$1,000.00) the receipt of which is hereby acknowledged, I hereby sell to the Westchester Hardwood Company all the standing wood measuring more than 6" diameter at stumps, said wood being located as follows:

"(1) Consideration, \$700.00. Wood in wood lot on Underhill Farm line, N. S. corner adjoining cross road leading from North St. to Friends Meeting House.

"(2) Consideration, \$300.00. Wood in wood lot on homestead of L. Disbrow. I except, however, from above about 25 locust trees measuring more than 6" diameter. I further give the Westchester Hardwood Company the right to put up mill and shanties necessary for them to proceed to cut and saw trees, and have said mill and shanties remain there until April 1st, 1896. The Westchester Hardwood Company agrees to remove above-mentioned mill and shanties upon 30 days' notice being given them by me in writing after April 1st, 1896. Cut wood and lumber may remain thereafter, if it should be necessary for them to leave it there, on such spots as may not be needed for laying out streets, &c.

"I further agree to permit the Westchester Hardwood Company to cart from wood lot of homestead of L. Disbrow, to wood lot on Underhill Farm across the clear land when crops will not be interfered with, as designated on map. During the crop season the other road is designated on map."

The trial court found that the defendant entered upon said lands within a few days after the date of said contract, and proceeded to cut and fell standing timber, not only upon the

wood lot on the Underhill and Disbrow lots mentioned in said contract, but also upon "pasture and small wood lot" and "the wood lot south of the orchard" which had not been sold by the plaintiff, and upon which the defendant had no right to enter.

It also found that the defendant had cut and felled not only the standing wood, trees and timber over 6" in diameter at the butt which were upon said wood lots sold to the defendant, and such other and smaller trees of less diameter which were necessarily cut and broken in felling the trees and timber over 6" in diameter, as contemplated by said contract, but also carelessly and unnecessarily cut and felled a large number of the standing wood and trees of smaller growth than 6" in diameter upon said wood lots, and in fact cut down all the standing wood and trees that were of value upon said two wood lots, except a fringe of trees near plaintiff's residence, between eighty and ninety of which were over 6" in diameter, and also excepting twenty-five locust trees on one of the wood lots which were reserved by the contract.

It was further found that the defendant also entered upon the wood lot designated as "pasture and small wood lot not sold" and the "wood lot south of the orchard," and without the authority or permission of the plaintiff cut, felled and removed all the standing trees and timber, with the exception of a few trees of a character and species which were of no value, and has cut and felled virtually all of the wood and timber and standing trees on said wood lots so as to leave the plaintiff's farm bare of wood, thus inflicting serious injury to the plaintiff's whole farm and to the freehold, and depreciating its value.

In its eleventh and twelfth findings of fact the court goes into detail as to the number of trees thus cut, felled and removed, and fixes the value of the mature wood and timber, which had a value apart from the wood lot, at the sum of \$224.00.

In its thirteenth finding of fact the court further finds:

"That by reason of the defendant's acts in unnecessarily cutting the small standing wood and trees in said lots upon the plaintiff's said farms, and by virtually destroying said wood lots and leaving the plaintiff's farm bare of standing wood and trees, it has depreciated and injured the whole property of the defendant and damaged his freehold to the extent and in the sum of \$2,500.00."

As conclusions of law the court finds, among other things:

(1) That the plaintiff "is entitled to recover such damages to his freehold as have been occasioned by the cutting, felling and destruction by defendant, or its servants and agents, of all the standing wood and trees 6" in diameter, or under, at the butt, from the two wood lots specified in the contract and diagram as the 'wood lot on homestead of L. Disbrow' and 'wood lot on Underhill Farm' which were wantonly, carelessly or unnecessarily destroyed, cut or broken down in felling the trees over 6" in diameter mentioned in the contract.

"(2) And plaintiff is also entitled to recover damages to his freehold by reason of the cutting and removal of the standing wood and trees from the two wood lots not designated, as above stated upon said diagram, and which in this action are described as the 'orchard wood lot' and the 'pasture and small wood lot not sold,' in which said two lots last named defendant was not authorized by said contract or otherwise to cut.

"(3) I further find and decide that the plaintiff is entitled to recover of the defendant the sum of \$2,500.00 for the damages and injury to the freehold and whole property by reason of the cutting, felling and destruction of the standing wood and trees which defendant cut and destroyed unnecessarily in all the wood lots upon the whole property, and including all which was cut in the wood lots, where defendant had no right to cut under the contract.

"(4) I further find and decide that in addition thereto, plaintiff is entitled to recover the sum of \$224.00, the value of the timber trees cut and felled on the 'pasture and small wood lot not sold,' and in the 'wood lot south of the orchard'



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Points of counsel.

which were cut and felled west of the rail fence in said last-mentioned wood lot."

The other features of the court's findings and conclusions which need to be considered will be referred to in the opinion.

*Edwin Countryman* for appellant. The court erred in adopting as the rule of damages the difference between the value of 185 acres of the land, with the wood cut off of two of the wood lots as per contract, and the value of the land after the defendant had finished felling trees thereon; in other words, the injury to that amount of land caused by the wrongful cutting of the full-grown, as well as the young and growing, trees. (3 Sedg. on Dam. [8th ed.] § 933; *Dwight v. E. C. & N. R. R. Co.*, 132 N. Y. 199; 3 Suth. on Dam. [2d ed.] § 1019; *Wallace v. Goodall*, 18 N. H. 439; *Livingston v. R. C. Co.*, L. R. [5 App. Cas.] 25; *Jegon v. Vivian*, L. R. [6 Ch. App.] 742; *Martin v. Porter*, 5 M. & W. 351; *Wild v. Holt*, 9 M. & W. 672; *Morgan v. Powell*, 3 Ad. & El. [N. S.] 278; *W. W. Co. v. U. S.*, 106 U. S. 432; *Foot v. Merrill*, 54 N. H. 490; *Beede v. Lampney*, 64 N. H. 510.) The rulings of the court on the question of damages were utterly inconsistent with each other and with the general rule of damages adopted by the court, and, as a result of such inconsistency, the defendant was mulcted in a much larger amount than under the rule the plaintiff was entitled to recover. (*Evans v. K. G. Co.*, 148 N. Y. 113.) The court erred in holding, as a conclusion of law, that the plaintiff was entitled to judgment restraining the defendant, its agents and servants, from removing any of the timber trees, saw logs or cord wood cut therefrom on the pasture and wood lot not sold, or upon the wood lot south of the pasture, and which was thereon at the time of the commencement of the action. (*Osterhout v. Roberts*, 8 Cow. 43; *Thurst v. West*, 31 N. Y. 210; *Marsden v. Cornell*, 62 N. Y. 215, 220; *Terry v. Munger*, 121 N. Y. 161, 165; *Fowler v. B. S. Bank*, 113 N. Y. 450; *Bank of Beloit v. Beale*, 34 N. Y. 473; *Kennedy v. Thorpe*, 51 N. Y. 174; *Youmans v. Bell*, 151 N. Y. 230.)

*Wilson Brown, Jr.*, for respondent. The measure of damages when growing timber trees are cut is the difference in the value of the realty before and after the trespass. (*Harders v. Harders*, 26 Barb. 409; *Humes v. Proctor*, 73 Hun, 265; *Edsall v. Howell*, 86 Hun, 424; *Johnston v. Kathan*, 88 Hun, 456; 3 Sedg. on Dam. [8th ed.] 45, § 933; *Chipman v. Hibbard*, 6 Cal. 162; *Wallace v. Goodall*, 18 N. H. 439; *Argotsinger v. Vines*, 82 N. Y. 308; *Van Deusen v. Young*, 29 Barb. 9; *Montgomery v. Locke*, 72 Cal. 75; *Carter v. Pitcher*, 68 N. Y. S. R. 661.) The measure of damages to the property or freehold is the value of the standing trees to the land, and that damage would be created if such trees and wood were felled and left upon the ground for plaintiff's use. (*Longfellow v. Quinby*, 33 Me. 457.)

WERNER, J. The unanimous affirmance below, of the judgment under review, obviates the necessity of examining the facts further than is essential to the proper disposition of the exceptions upon which the appellant relies.

Appellant's first challenge to the validity of this judgment is based upon exceptions taken to the rule of damages laid down by the court. It is urged that it was error for the court to adopt the rule that the plaintiff was entitled to recover the difference between the value of the land with the wood cut off the two lots, as per contract, and the value of the land after all the cutting, including that which was unauthorized by the contract. In support of this contention the learned counsel for the appellant cites many cases in other jurisdictions which lay down the rule that, for trespass in cutting full-grown timber, the market value of the wood is the measure of damages. This is undoubtedly the rule which still obtains in this state, and there is nothing to the contrary in *Dwight v. E., C. & N. R. R. Co.* (132 N. Y. 199), and the cases there cited. The reason for the rule that the value of the wood is the measure of damages in the wrongful cutting of mature timber, is that usually, in such cases, no injury is done to the land. When there is no such injury the value of the wood is the accurate

and complete measurer of compensation. But this rule like all others has its exceptions. One need not wander very far outside of the record before us for an illustration of injury to a freehold in denuding it of timber, whether it be young or mature, or both. In such a case the boasted efficacy of the law to right every wrong would fall far short of its promise if the injured owner of the freehold were limited to a recovery of the naked value of the wood. It is this distinction between a case where the complaining owner may, or must be, satisfied with the mere value of the wood taken, and one where the loss of the wood taken is merely incidental to the greater injury done to the freehold, that is emphasized by the decision in *Dwight v. E., C. & N. R. R. Co.* (*supra*).

In the cases before us the application of this distinction is made obvious by the terms of the contract. All trees upwards of six inches in diameter, except a few which were specifically reserved, were treated as mature and fit for cutting; while all below those dimensions were regarded as growing timber not to be interfered with further than was necessary in the felling of the mature trees. Without further elaboration of the theory upon which the distinction above adverted to is founded, we conclude that if the learned trial court had consistently applied and adhered to the rule of damages challenged by the appellant it would not be disturbed by this court.

This leads us to the consideration of appellant's next contention, which is that this rule, although once adopted, was not adhered to throughout the inquiry upon the subject of damages. The exceptions taken under this head raise one of the serious questions in the case. The first witness who testified upon the subject of damages was the plaintiff himself. Under proper objections and exceptions he was interrogated as to the value of his property before the execution of the contract of January 9, 1895, with the defendant, and then as to its value after all the cutting of timber. This inquiry was pursued with variations in the form of the questions until the court announced that "all the rulings and proceedings in

respect to the measure of damages in this action" are stricken out. Thereupon the plaintiff was recalled and the following questions were put to him: "What was the value of your property with the trees cut off over 6" in diameter at the butt, and with such smaller trees cut and destroyed, also as were necessarily felled or destroyed in cutting and felling those over 6" in diameter at the butt, upon those two wood lots which were sold under the contract?" After answering this question the plaintiff was asked: "What was the value of your property when the defendant finished felling trees thereon?" These same questions, with slight changes, were put to the same witness at different points in his examination. These latter questions, as will be observed, were in exact accordance with the rule of damages above referred to as applicable to the facts of this case. Since the defendant had the right by virtue of its contract to cut a certain portion of plaintiff's timber, the proper inquiry was: *First*, the value of the land after taking off and destroying the timber which the defendant was entitled to take and destroy, and, *second*, the value of the lands after all the cutting, both lawful and wrongful. But this adherence to the correct rule was of short duration and, when one Archer was called as a witness for the plaintiff, he was permitted, under objection and exception, to testify to the difference between the value of the land on January 1, 1895, and after the cutting. The same course was pursued in the examination of the witness Bard for the plaintiff. The vice of this method of examination is apparent in the fact that it utterly ignored the right of the defendant to cut the timber specified in his contract. As we have said, the inquiry should have been as to the difference in the value of the land after defendant had cut and felled the timber it was entitled to cut and fell under the contract, and then the value of the land after all the unauthorized cutting. This was a matter, not merely of form, but of real substance. It may be, as urged by respondent's counsel, that the court arrived at a just and accurate measure of damages. We cannot say,

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however, that it was not influenced by the failure to eliminate from the inquiry that portion of the injury to the freehold which was authorized by the contract. It is suggested that, probably, the court deducted the contract price from the damages proven; but this is obviously answered by the reflection that the contract price and the value of the contract may be entirely different things. It was not the contract price that was to be considered, but the value of the timber taken under the contract. No allowance was made for this essential factor in the inquiry, and this we think was substantial error.

Again, it said that the court erred in applying two separate rules of damages by awarding to the plaintiff the damages to his freehold, and also the value of the mature wood and timber cut and taken from the lands not embraced in the contract. We can see no objection to the application of both rules in cases where the evidence clearly differentiates the facts which make the basis of each rule. If, for instance, it had been clearly shown that the cutting of the mature timber not within the terms of the contract was not an injury to the freehold, and had not been considered as a part of the general denudation of the woodland, there would be no difficulty in awarding for this item of loss its exact equivalent in damages, which would be the value of the wood and timber. It would be equally practicable to award damages for any injury to the freehold which is definitely shown to have no relation to the mere cutting and taking of mature wood and timber. It is not apparent, however, that this distinction was observed in the admeasurement of damages. On the contrary, the context of the court's decision seems to justify the argument that the plaintiff has recovered for the loss of his mature wood and timber not embraced in the contract, in addition to the damages for injury to the freehold. In this condition of the record the judgment cannot be upheld.

There is another phase of this question of damages, so far as it relates to the cord wood, sawed logs and mature timber not within the contract, which bears upon the scope of

the injunction to which the plaintiff claims to be entitled. In its fifth conclusion of law the court finds, among other things, that the plaintiff is entitled to judgment restraining the defendant from removing any of the timber trees, sawed logs or cord wood cut therefrom upon the two lots not specified in the contract. This conclusion was duly excepted to by the defendant. It must be assumed, we think, that this conclusion refers to the mature timber, sawed logs and cord wood, for the cutting of which the plaintiff was awarded the sum of \$224 damages. It goes without saying that the plaintiff could not recover for the value of the wood wrongfully taken and still retain title thereto so as to entitle him to prevent its removal by the defendant. By electing to sue and recover for its value the plaintiff must be held to have waived the tort, and he must rely upon the contract of sale which, in such a case, the law implies. (*Terry v. Munger*, 121 N. Y. 161.) That part of the judgment which restrained the defendant from removing the wood, the value of which the plaintiff had elected to recover, was, therefore, inconsistent with the relief already granted.

We have reviewed this case at greater length than is usual when a single exception is sufficient to require a reversal of the judgment in the hope that upon another trial the plaintiff may avoid the errors which have rendered the first one fruitless of substantial results.

The judgment of the court below should be reversed and a new trial granted, with costs to abide the event.

PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT and LANDON, JJ., concur; CULLEN, J., not sitting.

Judgment reversed, etc.

STEPHEN A. WEST, Appellant, v. ALEXANDER S. BACON,  
Respondent.

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8165	624

**ATTORNEY AND CLIENT — WAIVER OF LIEN BY DECLARATION OF TRUST.**  
An attorney who makes a formal and explicit declaration of trust in favor of his client, with the statement that he holds property, which was the proceeds of a judgment recovered through him, for the purposes expressed in said judgment, and *in no other way*, and that upon the conveyance of the property to such persons as the *cestui que trust* may designate, he will pay over the proceeds of the sale to the latter, expressly waives any general or specific lien he may have had thereon for services rendered as attorney to the *cestui que trust*.

*West v. Bacon*, 18 App. Div. 371, modified.

(Submitted October 31, 1900; decided November 16, 1900.)

**APPEAL** from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 3, 1897, modifying, and affirming as modified, a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

This action was brought to compel the defendant, as trustee of the plaintiff, to convey to the latter or his nominee the premises described in the complaint. Prior to Nov. 8, 1889, the plaintiff's wife was the owner of said premises. On that day she transferred the same to one J. Adriance Bush. This conveyance she subsequently sought to annul in an action wherein she claimed that it was made in reliance upon certain false and fraudulent representations and promises made by her husband during a temporary reconciliation between them and after the discontinuance of a suit for a separation brought by her against him. The plaintiff in this action was allowed to intervene in the action to annul said conveyance and was given judgment therein, declaring that Bush was a mere naked trustee holding the premises free and clear of all the "dower rights, liens or interests whatsoever" of the said wife, and further providing that said defendant "J. Adriance Bush holds said property \* \* \* for the benefit of \* \* \* Stephen

A. West, free and clear of any and all dower rights or other liens or interests whatsoever of said Kate B. West," and directing that said trustee should make, execute and deliver to said Stephen A. West or to any person whom he might designate a good and sufficient deed, etc.

On the 29th day of December, 1892, said Bush, as such trustee, executed and delivered to the defendant a deed of said premises, which recites the provisions of said judgment, and that it is made upon the request of the plaintiff herein.

On the 30th day of December, 1892, the defendant executed and delivered to the plaintiff the following declaration of trust: "This declaration of trust made this 30th day of December, 1892, by Alexander S. Bacon, of Brooklyn, N. Y., in favor of Stephen A. West, of New York city, N. Y., witnesseth:

"Whereas, I, said Alexander S. Bacon, have this day received from J. Adriance Bush, Esq., a deed to premises known as No. 61 East One Hundred Twenty-eighth street, New York city, under and pursuant to the terms of a certain judgment of the New York Supreme Court, a copy of which is hereto annexed and made a part hereof, I do hereby declare that I hold said property for the purposes expressed in said judgment *and in no other way*, to wit, to hold the same for the benefit of said Stephen A. West, free and clear of any and all dower rights or other lien or interest whatsoever of Kate B. West, wife of said Stephen A. West, and to convey the same to such person as said Stephen A. West may in writing direct, *and to pay over the proceeds of such sale* to said Stephen A. West."

On the 3d day of May, 1895, plaintiff served upon the defendant a written demand for the transfer of said premises to one Charles D. Ridgway, who is the plaintiff's attorney in the present action. The defendant refused to comply with this demand upon the grounds as stated in his answer, that he claims a lien upon said lands as the proceeds of the judgment in the action brought by plaintiff's wife against said Bush as trustee, and in which the plaintiff herein was permitted to



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Points of counsel.

intervene as a defendant; and also a further lien for his general services as attorney and fees as trustee.

The Supreme Court at Special Term, without deciding whether defendant had a lien upon the lands described in the complaint; held that he was entitled to recover as trustee for his services, disbursements and fees the sum of \$294.02; and also "the sum of \$500.00 for his services rendered in other actions and proceedings for the plaintiff," and directed the defendant to deliver to the plaintiff or to his order a deed of the said premises upon payment to the defendant of the sum of \$794.02.

This judgment was modified by the Appellate Division by deducting therefrom the sum of \$50.00 for services not rendered in the action which resulted in this plaintiff's recovery of the land, and, as thus modified, affirmed the judgment herein.

*Charles D. Ridgway* for appellant. The equitable maxim invoked by the trial court has no application to the case at bar. (*Matter of Cooper*, 93 N. Y. 507; *Wilson v. Douglass*, 66 Md. 99; *Pickett v. Bullock*, 52 N. H. 354; *Raymond v. Tyson*, 17 How. Pr. 53.) The defendant cannot claim to hold a lien on this property as attorney at law because he has declared by his declaration of trust that he holds for the purposes expressed and in no other way. The lien must give way to the terms of the express contract he executed unless he entered into it by mistake or through fraud. (*Matter of Larned*, 20 Wkly. Dig. 73; *Henry v. Fowler*, 3 Daly, 202; 1 Am. & Eng. Ency. of Law, 969.)

*George Edwin Joseph* for respondent. The premises were the proceeds of the judgment and the lien of the defendant followed them in whosoever hands they may have come. (Code Civ. Pro. § 66; *Matter of H.*, 87 N. Y. 523; *Williams v. Ingersoll*, 89 N. Y. 508; *Goodrich v. McDonald*, 112 N. Y. 157.) Defendant did not waive his attorney's lien by the execution of the declaration of trust; nor is there such inconsistency in the relationship of trustee and attorney as

would create a waiver of attorney's lien where the trust property is the proceeds of a judgment recovered through the attorney who accepts the trust therein at the request of his client. (Code Civ. Pro. § 66.)

WERNER, J. In our view of this case it is unnecessary to determine whether the defendant had either a general equitable lien or a specific attorney's lien upon the lands described in the complaint. Any lien he may have had was expressly waived by his declaration of trust in which he says: "I hold said property for the purposes expressed in said judgment, *and in no other way*;" and by the explicit provisions of which he binds himself "to convey the same to such person as said Stephen A. West may in writing direct, and to pay over the proceeds of such sale to said Stephen A. West."

The learned Appellate Division took the view that these words could not be construed as a waiver of defendant's lien, and should be held to mean nothing more than that he took the title as the nominee of the plaintiff, subject to the terms of the judgment in the suit of *West v. Bush*. We find ourselves unable to concur in this view.

It is to be remembered that the defendant, before he became plaintiff's trustee, had been his attorney in the suit out of which the subject of the trust arose. While sustaining that intimate and confidential relation to the plaintiff he assumed the trust under which he now holds the property in suit. In assuming this trust the defendant, with full knowledge of his legal rights, and with presumptive knowledge of the effect of his acts, made a formal and most explicit declaration of trust, in which the statement that he holds the property for the purposes expressed in the judgment therein described is emphasized by the declaration that he holds the same "*in no other way*." This is followed by the equally unequivocal statement that upon the conveyance of said premises to such person as said West may in writing direct, he, the trustee, will "*pay over the proceeds of such sale to said Stephen A. West*."

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Statement of case.

It is said that any construction of this language which attributes to the defendant an intention to waive his lien is forced and unnatural. We think that any other construction would be repugnant to the plain meaning of the words used. We find it difficult, indeed, to discuss at length a proposition so obvious and in such exact accord with the principles applicable to the subject of waiver. We think it was error to allow the defendant any sum whatever for his services as attorney, and that his recovery should have been limited to the allowance made to him as trustee which, for apparent reasons, rests upon an entirely different basis than his compensation as attorney.

The judgment of the court below should be modified by deducting therefrom the sum of \$450.00 in addition to the \$50.00 deducted by the Appellate Division, and as thus modified affirmed, without costs to either party.

GRAY, O'BRIEN, HAIGHT, LANDON and CULLEN, JJ., concur; PARKER, Ch. J., dissents.

Judgment accordingly.

**JAMES R. WHYTE et al., Appellants, v. THE BUILDERS' LEAGUE OF NEW YORK, Respondent.**

**EASEMENT** — WHEN NONE CAN BE IMPLIED FOR SUPPORT, ACCESS AND FOR USE OF WATER AND SEWER PIPES. Where by mutual conveyances of equal date, with full covenants against all incumbrances and without any reservations, one of two adjoining lots is conveyed to one heir and the other lot to another heir, there is no implied easement, in favor of either lot against the other, for support of, or access to, a frame building standing at the time of the ancestor's death, and covering about eight feet of each lot, it being under the same roof as houses on either side, from which it was separated by studding partitions, its chimney standing on the line between the two lots and its entrance being entirely on one of them; nor is there any implied easement as to a common sewer running along the dividing line, or as to a water supply pipe for said building coming through one of the lots, in the absence of a finding that it was necessary that they should pass through one of the lots in order to reach and serve the other.

*Whyte v. Builders' League*, 85 App. Div. 480, affirmed.

(Argued October 31, 1900; decided November 16, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 19, 1898, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

The judgment determines that the plaintiffs, whose lot adjoins the lot of the defendant, had no easement or appurtenance in the defendant's lot or building either for support or access, or for the use of water and sewer pipes. The trial judge found that Andrew Crawford died in 1874, seized of the two lots in question, fronting upon 126th street in the city of New York, each 25 feet front and rear, and in depth, side by side, 100 feet. Upon the rear of these lots there existed, at the time of his death, three frame houses under one roof; the middle house was separated from the two others by studing partitions, and it covered about eight feet of each lot. The chimney of the middle house stood on the line between the two lots; the entrance to the middle house was on the easterly lot. A common sewer ran along the dividing line, and the water supply pipe for the middle house came through the easterly lot.

In 1880, by conveyances of equal date, with full covenants against all incumbrances, between the heirs at law of Andrew Crawford, the easterly lot was conveyed to Barbara Ewan and the westerly lot to Jessie Whyte, the mother of the plaintiffs, who succeeded to her title upon her death in 1893. Each grantee was a daughter and heir at law of Andrew Crawford. Barbara Ewan conveyed the easterly lot to the defendant July 7, 1897. Up to a short time prior to the last-mentioned date, the owners of the two lots united in renting the middle house to tenants; they divided the rents between themselves. Just prior to the conveyance to the defendant, the middle house was sawn through on the dividing line of the two lots. Before said conveyance the plaintiffs notified defendant that they claimed rights in that portion of the middle house which stood on the easterly lot. After said conveyance the defendant removed the separated part of the middle house which stood

on the easterly lot, thus destroying the sewer connection and water supply to the portion of the house on the westerly lot, and then erected a new building covering nearly the whole of the easterly lot. The plaintiffs arranged their part of the middle house for use with their adjoining house on the westerly lot.

*Charles D. Ridgway* for appellants. Upon the partition of these two lots between plaintiffs' devisor and the defendant's grantor, each held and owned her lot impressed with all the apparent and continuous easements or servitudes which existed over the lots at the time of the partition. (*Lampman v. Milks*, 21 N. Y. 505; *Butterworth v. Crawford*, 46 N. Y. 349; *Curtis v. Ayrault*, 47 N. Y. 73; *Rogers v. Sinshimer*, 50 N. Y. 646; *Schile v. Brokhahus*, 80 N. Y. 614; *Simmons v. Cleman*, 81 N. Y. 557; *Paine v. Chandler*, 134 N. Y. 385; *Spencer v. Kilmer*, 151 N. Y. 390; *Huttermier v. Albro*, 18 N. Y. 48; *Richards v. Rose*, 9 Exch. 218; *Wilson v. Wightman*, 36 App. Div. 41; *N. Y. C. & H. R. R. Co. v. Needham*, 29 Misc. Rep. 436; *Pearsall v. Westcott*, 30 App. Div. 104.) It was error to dismiss the plaintiffs' complaint because they showed substantial damages as a consequence of the wrongful acts of the defendant. (*Murtha v. Curley*, 90 N. Y. 372; *Valentine v. Richards*, 126 N. Y. 277; *Lyle v. Little*, 28 App. Div. 181.)

*Rudolf Dulon* and *J. Brewster Roe* for respondent. Any easement that the plaintiffs may have had in that part of the middle house which stood on the easterly lot was terminated by the destruction of the building before the defendant took title. (*Heartt v. Kruger*, 121 N. Y. 386; *Douglas v. Coonley*, 156 N. Y. 521; *White v. M. R. Co.*, 139 N. Y. 24; *Gerard's Tit. to Real Estate* [4th ed.], 774.)

LONDON, J. The plaintiffs in their complaint ask that the defendant restore the middle house and pay damages for interference with their use of it. They rely mainly upon *Rogers*

v. *Sinsheimer* (50 N. Y. 646). That was the case of a party wall, wholly standing upon the plaintiff's lot and two inches inside of his lot. The grantors of both parties took title to their separate lots from the former owner of both, who erected the houses, each supported by the common wall. This court held that the plaintiff could not maintain ejectment for the two inches and a half of the party wall occupied by the defendant "so long at least as the buildings should endure." The justice of recognizing under the circumstances an easement in the party wall separated by only two inches from the defendant's land, so long as the conditions should remain unchanged, is apparent. There was no holding that the plaintiff could not change the conditions; that he could not tear down his old house and build a better one, or that if he should tear it down the defendant could compel him to restore it. The defendant in that case was permitted to enjoy the party wall while it should last, and also the two inches necessary to its enjoyment. In the case under review, before the conveyance to the defendant, the middle building was sawn asunder upon the boundary line, and after the conveyance the defendant tore down its half of the house and erected a better building in part upon its site. The easement, if there was any, thus reached the limit of its life. But we do not think there was any.

In *Griffiths v. Morrison* (106 N. Y. 165) the plaintiff was the owner of two adjoining lots, numbers 141 and 143, and he conveyed to the defendant's grantor No. 141 and retained No. 143. At the time of the conveyance a house stood on the lot conveyed and extended five feet over the line between the two lots and up to a building upon the lot retained by the plaintiff, and the side of the latter building formed the walls of the rooms in the defendant's house; the two buildings, however, were in no wise keyed together. The plaintiff, although he was the grantor, brought ejectment for the five feet and this court sustained his recovery. The court in its opinion mentions the fact that the buildings were not keyed together, and thus one was not needful for the support of the

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other, but the judgment rested upon the fact that the plaintiff had conveyed no title to the five feet or easement in it. "If," said PECKHAM, J., speaking for the court, "there had been any thought of conveying that portion of the house which stood on land not conveyed, or of erecting any easement upon the land not conveyed, in the nature of a right of support for the walls of the building, I think language would have been used which would have made it plain that such was the intention."

So in the case before us. By the mutual conveyances in 1880, by which the entire lot was divided and the westerly half conveyed to the plaintiff's mother and the easterly half to the defendant's grantor, with full covenants and without reservation, the intention to effect a complete severance of the estates was manifested. If the heirs of Crawford, the former owner of both lots, had first conveyed the westerly half and had retained the easterly half, conveying it later, the case would have some features now absent of an intent to vest in the grantee of the westerly half, the plaintiffs' mother, such existing and visible servitudes in the lot retained as would be necessary to the enjoyment of the lot and buildings first sold. (*Lampman v. Milks*, 21 N. Y. 505; *Butterworth v. Crawford*, 46 N. Y. 349; *Simmons v. Cloonan*, 81 N. Y. 557; *Paine v. Chandler*, 134 N. Y. 385; *Spencer v. Kilmer*, 151 N. Y. 390.)

Here, however, both grants were of the same date, and each grantee was one of the grantors of the other, and both united in the severance of the common estate. Besides, the middle building was apparently a cheap structure. Why divide it by a line which would cut the house and its rooms into two parts if it was intended that each part should continuously support the other forever? The intention seems to be clear that such division was made because it was not expected that the middle house would long exist.

As was said in the *Morrison* case, the character of the easement claimed does not differ in effect from the claim of a fee to the eight feet; it requires the use of that amount of land

belonging to the defendant. It would be intolerable to extend the doctrine applicable to party walls so far as to compel the owner of a lot, in the absence of an express grant or reservation, to maintain or permit its maintenance by the adjoining owner, in the interior of his lot, thus giving to the adjoining owner not only the support of the wall but the dominant use of the intervening space in order to reach his distant support. No case to which we are cited goes so far.

As to the water and sewer pipes, it was not found that it was necessary that they should pass through the defendant's lot in order to reach and serve the plaintiff's lot, and, as there is no grant or reservation of such a privilege, none exists.

The judgment should be affirmed, with costs.

PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, CULLEN and WERNER, JJ., concur.

Judgment affirmed.

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HERMAN ELLIS, Respondent, v. LEOPOLD MILLER et al.,  
Appellants.

1. CONTRACT TO FURNISH GOODS — MEASURE OF DAMAGES FOR BREACH OF. A contract to furnish at least \$1,000 worth of cigarettes a year, plus two per cent of that sum, is implied by an agreement for a term of five years, executed between a cigarette manufacturer and certain dealers, providing that the former shall allow the latter \$1,000 per annum to be deducted in equal monthly installments from current bills, and shall make a further allowance of two per cent below the price given to any other house in the states of New York and New Jersey on a certain brand of cigarettes, in consideration of which the dealers bind themselves to "push" that brand of cigarettes and not to push other brands, and the measure of damages for the breach of such contract by the manufacturer's refusal to furnish the cigarettes is the difference between the amount the dealers were to receive in case they performed it and the cost of performance.

2. APPEAL — DISMISSAL OF COUNTERCLAIM ON THE GROUND THAT THE FACTS STATED DO NOT CONSTITUTE A CAUSE OF ACTION. Where, in an action by the manufacturer for a balance due on account of goods sold and delivered, the dealers interposed a counterclaim, alleging a breach of the plaintiff's implied contract to furnish them with goods, a dismissal of the counterclaim, on the ground that the facts stated did not constitute a



cause of action, after defendants had opened their case to the jury, had entered upon their evidence and had shown that the plaintiff had sold and transferred his business, is erroneous, where the motion to dismiss was not based upon any insufficiency of the evidence, but upon the ground that there was no such implied contract, and the record does not show that the defendants had closed their case when the motion was granted.

*Ellis v. Miller*, 22 App. Div. 38, reversed.

(Argued October 31, 1900; decided November 16, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 18, 1897, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

*M. S. Guiterman* for appellants. The contract contains reciprocal obligations based upon a sufficient consideration binding on both parties. (*K. B. & Co. v. F. Mfg. Co.*, 78 Iowa, 679; *Rapoloritz v. A. T. Co.*, 73 Hun, 87.) When the language of a contract is obscure or doubtful, and does not furnish conclusive evidence of its meaning, the surrounding circumstances will be regarded, and the intention of the parties becomes a mixed question of law and of fact. (*Dodge v. Gardiner*, 31 N. Y. 239; *E. Nat. Bank v. Kauffman*, 93 N. Y. 273; *Smith v. Kruze*, 114 N. Y. 190; *Woolsey v. Funke*, 121 N. Y. 87; *Robertson v. O. E. Co.*, 146 N. Y. 20; *Reynolds v. C. F. Ins. Co.*, 47 N. Y. 597; *Merriam v. U. S.*, 107 U. S. 437; *Gardiner v. Clark*, 17 Barb. 538; *F. Nat. Bank v. Dana*, 79 N. Y. 108; *Camp v. Trainor*, 143 N. Y. 649.) The practical interpretation put upon the instrument by the parties should prevail. (*O'Hara v. Harmon*, 14 App. Div. 167; *B. P. Co. v. N. Y. M. School*, 15 App. Div. 417.) It is an implied condition of every contract that the party to be bound by it will do whatever acts are necessarily incidental to the performance of the contract, with a reasonable interpretation of its provisions. (*B. T. Co. v. M. Mfg. Co.*, 1 App. Div. 507; *Booth v. C. M. Co.*, 74 N. Y. 21; *V. P.*

*Fabricken v. Rogers*, 52 App. Div. 529; *Barton v. McLean*, 5 Hill, 256; *Lawson on Cont.* § 55.)

*Theron G. Strong* for respondent. The plaintiff was not in default with respect to the performance of the contract. (*Vandegrift v. C. E. Co.*, 161 N. Y. 435; *Ziehen v. Smith*, 148 N. Y. 558; *Higgins v. Eagleton*, 155 N. Y. 466; *Devlin v. Mayor, etc.*, 63 N. Y. 8; *R. L. Co. v. S. & P. P. Co.*, 135 N. Y. 209.) No covenant to sell or purchase any cigarettes should be implied as it is impossible to infer from the agreement, as a basis for an implied covenant to buy or sell, what quantity of cigarettes was in the contemplation of the parties. (*Newell v. Wheeler*, 36 N. Y. 244; *C. & G. E. R. Co. v. Dane*, 43 N. Y. 240; *Arnot v. P. & E. C. Co.*, 68 N. Y. 565; *Hornbostel v. Kinney*, 110 N. Y. 94; *H. C. Co. v. P. C. Co.*, 8 Wall. 276.) A covenant to sell cannot be implied as the writing and the implication would not constitute separately or together a valid agreement of bargain and sale under the Statute of Frauds. (Brown on Statute of Frauds, § 385; *Benj. on Sales* [6th ed.], 211; *May v. Ward*, 134 Mass. 127; *Mentz v. Newitter*, 122 N. Y. 491; *Drake v. Seaman*, 97 N. Y. 230; *Cheever v. Schall*, 87 Hun, 32; *Wright v. Weeks*, 25 N. Y. 153.)

CULLEN, J. The plaintiff sued for a balance due on account of goods sold and delivered. The answer admitted the claim, but set up two counterclaims for damages for plaintiff's breach of an agreement under which the goods were sold. The plaintiff was a manufacturer of cigarettes. The defendants were large dealers and jobbers in cigarettes and other manufactures of tobacco. After having had business together for some time the parties executed this written instrument: "This agreement, made this 18th day of September, one thousand eight hundred and ninety-four, between H. Ellis & Company, of Baltimore, Maryland, parties of the first part, and Leopold Miller & Sons, of New York, parties of the second part: Witnesseth: That the parties of the first part are to

make an allowance to the parties of the second part of one thousand dollars per annum, said amount to be deducted in equal monthly installments (\$83.33) from current bills. Parties of the first part also bind themselves to make a further allowance of two (2%) per cent below the price given to any other house in the States of New York and New Jersey on the 'Recruit' cigarettes. In consideration of the above, the parties of the second part also bind themselves not to push any nickel package of all tobacco cigarettes made of bright tobaccos; and they further bind themselves not to sell or offer for sale — directly or indirectly — the said 'Recruit' cigarette for less than \$3.60, less 2%, per thousand. And they also agree to push and do all in their power to increase the sale of the said 'Recruit' cigarettes. This agreement to remain in force from five years from the above date. H. Ellis & Co. Leopold Miller & Sons. Witness: Abraham De Lemos." The first counterclaim was allowed by the plaintiff upon the trial. The second counterclaim alleged that the defendants performed the contract above recited, but that the plaintiff refused to perform the same to the defendants' damage in the sum of twenty thousand dollars. It appears from the evidence so far as it was developed when the court terminated the trial, that in the spring of 1895 the plaintiff sold and transferred his business to the American Tobacco Company. The appellants contend that on such sale the plaintiff notified them that he would no longer supply them with goods and this is the breach complained of. After the defendants' counsel had opened his case to the jury the plaintiff moved to dismiss this counterclaim on the ground that the facts stated did not constitute a cause of action. The motion was denied and the defendants entered upon their evidence. When the trial had proceeded to some extent the court stated to the defendants' counsel that it did not see that the second counterclaim could be maintained. After giving its reasons for that determination it granted "the motion made at the beginning of the case on behalf of the plaintiff," to which proper exception was taken. A verdict was directed for the plaintiff for his claim

less the amount of the defendants' first counterclaim. To this also exception was taken. There is nothing in the record to show that at the time the court intervened the defendants had rested their case.

This judgment has been affirmed on appeal by a divided court. The ground on which the action of the trial court proceeded was that under this agreement there was no obligation upon the part of the plaintiff to sell any goods to the defendants, or any obligation upon the part of the defendants to buy any goods; that its only effect was to prescribe the terms on which the goods should be sold in case the plaintiff should be willing to sell and the defendants be willing to buy. This was in effect holding that the agreement was such only in name and form. For if it imposed no duty to buy on the one part or to sell on the other, it is plain that on any subsequent sales either party might require such terms and conditions as he saw fit. Two of the learned judges of the Appellate Division took the same view of this agreement as that held by the trial court. Mr. Justice INGRAHAM, while repudiating this construction of the instrument, thought that the transfer of the plaintiff's business to the tobacco company was not of itself a breach of the agreement, since the plaintiff's obligations could be discharged by his assignee, and that the defendants had failed to prove that the plaintiff refused to carry out his contract. For this reason he concurred in an affirmance of the judgment. Mr. Justice PATTERSON wrote for the minority, holding the written agreement imposed effective and substantial obligations on the parties.

In this latter view we concur. The parties certainly thought they had made a contract, for they not only signed the written instrument, but took pains to have it witnessed. Courts should not be astute to so construe it as to render it nugatory. Definite obligations were imposed upon the defendants. A violation of their negative covenant not to "push" any nickel package of bright tobacco cigarettes could be restrained by injunction, and while it is possible that the courts would not compel a specific performance of their affirmative covenant to

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"push" the sale of the "Recruit" cigarettes which the plaintiff was manufacturing, still, for the breach of that covenant damages could be recovered in an action at law. On the other side, the plaintiff entered into a positive obligation to allow the defendants a thousand dollars a year to be deducted in equal monthly installments from the current bills. This necessarily imported an agreement on the plaintiff's part to sell the defendants at least one thousand dollars worth of cigarettes a year; for, otherwise, it would be impossible to credit the defendants with that amount on their purchases. The plaintiff also agreed to charge the defendants for goods two per cent less than the current price charged to other dealers. This would increase the annual allowance by that percentage, in other words, make it \$1,020. Doubtless both parties contemplated that the business would be continued as it had been previously carried on, and that it would be to the interest of the plaintiff to furnish the defendants as many goods as they could sell, but there is no agreement to that effect, and we think the obligation of the plaintiff is confined within the limit stated. Under this view of the contract the measure of damages is plain; that is, the difference between the amount the defendants were to receive in case they performed the contract and the cost of performance. If it should be proved that the defendants' profits on the sales made by them, above the price they were required to pay for the goods, would equal or exceed the cost of performance, then no deduction should be made.

We agree with Mr. Justice INGRAHAM that the transfer and sale of the plaintiff's business did not *per se* constitute a breach of the contract (*Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435), but the point on which he disposed of the case in our opinion is not presented by the record. The motion granted by the court was that made by the plaintiff at the opening of the defendants' case, a motion based not on any insufficiency of evidence, but on the ground that the instrument imposed no obligation on the plaintiff to furnish goods. As already stated, the record does not show that the defend-

ants had closed their case, and, after the opinion expressed by the court, it would have been idle for them to adduce further testimony.

The judgment should be reversed and a new trial granted, costs to abide the event.

PARKER, CH. J., GRAY, O'BRIEN, HAIGHT and WERNER, JJ., concur; LONDON, J., concurs in result.

Judgment reversed, etc.

THE BABCOCK PRINTING PRESS MANUFACTURING COMPANY,  
Respondent, v. GEORGE E. RANOUS, Appellant, Impleaded  
with ELIZABETH SHERWOOD et al., Respondents.

1. INSURANCE — VALIDITY OF A VOLUNTARY AGREEMENT BY A FOREIGN INSURANCE COMPANY CREATING A FUND FOR THE BENEFIT OF POLICYHOLDERS. An agreement between a foreign insurance company and an agent representing it in the state, whereby sixty per cent of the net premiums received by the latter for insurance were to be deposited in trust for the benefit of such persons in the United States as shall effect insurance in the company through his office, is not invalid as against policyholders not beneficiaries thereunder, in the absence of fraud or some positive law forbidding it.

2. EFFECT OF ATTACHING FUND AS WAIVER OF RIGHT TO ASSERT TRUST THEREIN. Policyholders who are the beneficiaries of such trust fund do not waive their rights as beneficiaries as against an attaching creditor of the insurance company by themselves attaching the fund subsequently to his attachment.

*Babcock P. P. Mfg. Co. v. Ranous*, 81 App. Div. 629, affirmed.

(Argued November 1, 1900; decided November 16, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 19, 1898, affirming a judgment in favor of plaintiff and the defendant Sherwood, entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Omar Powell* and *Daniel L. Cady* for appellant. The contract between Baynes and Lewis did not purport to be the

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contract of the Great Northern Insurance Company. (*Newton v. Bronson*, 13 N. Y. 587; *Mayor, etc., v. Stuyvesant*, 17 N. Y. 34.) The contract did not create a trust. (*Hermans v. Robertson*, 64 N. Y. 332; *Kelly v. Robertson*, 40 N. Y. 432; *Butler v. Duprat*, 20 Wkly. Dig. 350; *Sullivan v. Sullivan*, 161 N. Y. 554; *Williams v. Ingersoll*, 89 N. Y. 508; *Thomas v. N. Y. & G. L. R. Co.*, 139 N. Y. 163; *Uhlman v. N. Y. L. Ins. Co.*, 109 N. Y. 421; *S. I. C. & B. B. Club v. F. L. & T. Co.*, 41 App. Div. 321.) By attaching and basing their rights in this action upon their judgments in attachment, the plaintiff and the defendant Sherwood are estopped from claiming the money as a trust fund and not subject to attachment. (*Evans v. Warren*, 122 Mass. 303; *Haynes v. Sanborn*, 45 N. H. 329; *Citizens' Bank v. Dows*, 68 Iowa, 460; *Buck v. Ingersoll*, 11 Metc. 226; *Legg v. Williard*, 17 Pick. 140; *Jacobs v. Latour*, 5 Bing. 130; *Steinbach v. R. F. Ins. Co.*, 77 N. Y. 498; *Fowler v. B. S. Bank*, 113 N. Y. 450.)

*Joseph H. Fargis* for respondents. The agreement was properly made for the express purpose of creating a fund for the protection of certain policyholders. (*R. L. Works v. Kelly*, 19 Hun, 399; 88 N. Y. 234; *Martin v. Funk*, 75 N. Y. 134; *Ruggles v. Chapman*, 59 N. Y. 163; *Matter of H. P. S. F. Assn.*, 129 N. Y. 288.)

O'BRIEN, J. This is a controversy between the different classes of creditors of a foreign insurance company for the appropriation of a special fund on deposit in the trust company to the credit of the defendants Lewis and Baynes for the benefit of the plaintiff and other policyholders as they claim.

It appears from the pleadings, proofs and findings in the case that on the 3d day of November, 1893, one Lewis was acting as the agent in the city of New York of the Great Northern Insurance Company of Manitoba, Canada, soliciting applications for insurance, receiving premiums and delivering

policies. As a condition of accepting the agency he stipulated with the company that sixty per cent of the net premiums received by him for insurance should be deposited in trust for the benefit of such persons in the United States as should effect insurance in the company through his office. There was an agreement in writing to that effect between him and the general manager of the company, and in pursuance of that instrument the premiums were deposited and such deposits constitute the fund in question. The plaintiff and the defendant Mrs. Sherwood claim this fund as beneficiaries under the agreement, since they belong to that class of policyholders for whose benefit it was created, namely, those procuring their insurance through Lewis, the agent.

It is admitted that there was a loss upon these two policies which is sufficient in amount to absorb the fund. The other claimant of the fund is the defendant Ranous, as assignee of a policyholder in St. Louis upon whose policy there was also a loss, and he claims under an attachment in an action upon the policy in the courts of this state. The validity of this claim depends upon the question whether at the time of the levy under the attachment the fund belonged to the company or to the policyholders whose insurance was written by Lewis. If it belonged to the latter, then the attaching policyholder had no interest in it, since his policy was not procured through the New York agency of Lewis.

The learned trial judge held that the fund belonged to the plaintiff and the other creditor whose insurance contract was issued by or from the New York agency, and that the attaching creditor acquired no lien as against them, and this decision was affirmed on appeal.

It is not alleged or found that the trust agreement under which the fund was deposited is affected by any fraudulent purpose on the part of the company, nor is it alleged or found that the company is insolvent. So far as we can know from this record it is abundantly able to pay all of its creditors in full.

The answer of the attaching creditor alleges that the insur-



ance company was not authorized to transact business in this state, but the findings are silent on the point, and even if the fact had been found we cannot perceive how it would aid his claim. All the parties claim title or right to the fund under or through the company. They are all in the attitude of asserting that the premiums paid by local policyholders from which the fund was derived were paid upon contracts of insurance with the company, and hence they are not in a position to question the right of the company to receive and dispose of the money thus paid. Indeed, any view of the case that would deny the right of the company to receive and dispose of the money paid for premiums would be fatal to the claim of the attaching creditor. If the money did not belong to the company, then it belonged to Lewis, who received it as agent, and he is in the attitude of asserting that it belongs to the plaintiff and the other defendant, for whose protection, in case of loss upon their policies, he deposited it in trust. Neither party can claim the fund without adopting, or at least recognizing, the agencies through which it was created.

The decision of the court below is unanimous, and in this court it must be assumed that the parties who professed to act for the company in setting aside the fund for a special purpose had in fact authority to do so. The finding is that the company by its manager and trustee entered into the written agreement with Lewis; the agent or underwriter, whereby sixty per cent of the premiums received by him were to be deposited as a special trust fund and devoted to the protection of any losses upon policies written by him for parties in this country. The writing itself was produced at the trial and appears in the record. It certainly warranted the finding. The only question that can arise is with respect to the authority of the person who assumed to act as manager or trustee for the company to make it. The proof on that point was very slight, if indeed there was any at all. But the paper was admissible in evidence, since it was the very instrument under which the fund was accumulated and without which the money could not be traced to the company or its business.

It was the only proof in the case that the fund represented premiums received in the business of insurance, and that fact was as important to the attaching creditor to uphold the attachment as to the other parties to establish the trust. It may be that it should have been supported by proof of some express authority from the company to create a trust for the benefit of particular creditors with a portion of its funds. However that may be, the defect, if any, was a defect in the proof of a fact which was in issue, namely, the authority to make the agreement, and this court is concluded on all matters of fact by the finding and unanimous decision below.

The paper on its face purported to be the act of the company, and was executed by the two persons who represented it in this state and the only persons who ever assumed to represent it, so far as appears from the record. The paper was, therefore, admissible, and all that can be said now concerning it is that it was not sufficient to establish the fact in issue. But in this court, after the fact has been found and the finding affirmed on appeal by a unanimous decision, we are not concerned with questions touching the mere sufficiency of proof.

The only question of law in the case is whether the representatives of the company in this state severed the fund in question from the assets of the corporation and placed it in a special trust for the benefit of the plaintiff and such other policyholders as fall within the class described in the written instrument. If so, it was beyond the reach of the attachment, and the attaching creditor acquired no lien.

We can perceive no reason for questioning the validity of this transaction. We think that the purpose of the company, manifested by the writing and the act of the agent in making the special deposit, created a valid trust for the benefit of the policyholders who had intrusted their business to him, and perhaps had no other security for the payment of the risks insured. While the transaction was unusual and peculiar, it must be borne in mind that we are not in possession of all the facts that led up to it and that might have rendered it neces-

sary. A foreign insurance company is required by law, as a condition of acquiring the right to do business in this state, to deposit a large fund for the security of local policyholders. The transaction in question was the voluntary act of the company in which it attempted to do for a few persons what the state would require it to do for many. (*People v. Granite State Provident Assn.*, 161 N. Y. 492.) In the absence of fraud or some positive law forbidding such a disposition of any part of its funds by a corporation, there is no reason to doubt the validity of the transaction, and, moreover, we think that the principle has been sanctioned by this court. (*Rogers Locomotive & Machine Works v. Kelley*, 88 N. Y. 235.) The company in this case put the fund in question beyond its control as effectually as in the case cited; and if so, that fact is a complete answer to the claim of the attaching creditor. The fact that the plaintiff and the other policyholder who recovered in the courts below also attached the fund subsequent to the appellant, cannot operate to change the title. Nor was it a case where a party avails himself of an inconsistent remedy. The doctrine of the election of remedies has no application to such a case. A party who owns a fund to be applied in payment of his debt does not lose his right to it because he has sued the debtor and attempted to apply the fund in satisfaction of the judgment. Whatever title to the fund that the plaintiff and the other policyholder acquired under the trust agreement was not lost or affected by a proceeding at law for the collection of the debt. The action at law was perhaps necessary in order to liquidate the claims for loss upon the policies, and the mere fact that they also levied upon the fund did not operate to divest any right to it that they acquired under the trust agreement.

We think that the judgment is right and should be affirmed, with costs.

PARKER, Ch. J., GRAY, HAIGHT, LANDON, CULLEN and WERNER, JJ., concur.

Judgment affirmed.

THE KETCHAM NATIONAL BANK, Appellant, v. ARTHUR T.  
HAGEN, Respondent, Impleaded with Another.

PARTNERSHIP — LIABILITY OF PARTNER ON FIRM NOTE GIVEN FOR PURCHASE OF PROPERTY. Where one of two partners engaged in the bicycle business gave the firm note in part payment of the purchase price of a cement business, the fact that the purchase was made without the knowledge or consent of the other partner does not release the latter from liability when it does not appear that the purchase was made by or for any other person than the firm, or for any other purpose than that of the firm, and it does not appear that he never ratified it or that the firm never took over the new business.

*Ketcham Nat. Bank v. Hagen*, 85 App. Div. 630, reversed.

(Argued October 31, 1900; decided November 16, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 17, 1898, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court upon a special verdict of a jury.

The action was to recover upon a promissory note as follows:

"\$5,000.00. TOLEDO, O., June 30, 1897.

"Six months after date we promise to pay to the order of Arlington U. Betts five thousand dollars at Rochester, N. Y., interest at 6 per cent.

"Value received. F. W. FRANCE & CO."

The complaint alleged that the appellant Hagen and F. W. France at the time of the making of the note were copartners in business in Rochester, N. Y., under the firm name of F. W. France & Company, and as such made and delivered the note to the payee therein named, who indorsed and delivered it to the plaintiff for value received before maturity. Hagen's defense was that he was not a partner, and even if he were, that he was not liable upon the note, because it was given by France in part payment for the purchase price of a cement business which was entirely distinct from the firm business, which was a bicycle business; and that France purchased this

separate business without his — Hagen's — knowledge or consent. The signature to the note was made by France, and he delivered the note to the payee, who indorsed it and had it discounted by the plaintiff before maturity. It was in part payment of a rubber and cement business which France purchased in the name of France & Company. No payment has been made upon it. Upon the trial evidence was given upon the controverted questions, whether Hagen was in fact a partner in the firm of France & Company; whether he knew of the purchase of the new business at the time, and whether Hagen had any connection with it after it was purchased, and the character of the two businesses and how carried on.

Upon the close of the testimony the trial court, without objection from either party, submitted three questions, which, with the answers made by the jury, are as follows:

"Q. Was the defendant, Arthur T. Hagen, on the 30th day of June, 1897, the day of the making of the promissory note in suit, a copartner of F. W. France in the bicycle business carried on at the corner of Main and Cortland streets, in Rochester, N. Y., under the firm name and style of F. W. France & Co.? A. Yes.

"Q. Was the promissory note in suit made and delivered as part consideration of the purchase of the rubber and cement business of Arlington U. Betts of Toledo, Ohio, by the firm of F. W. France & Co.? A. Yes.

"Q. Was such purchase made with the knowledge and consent of the defendant Arthur T. Hagen? A. No."

No general verdict was rendered. The court directed judgment for the defendant, dismissing the complaint upon the merits. The order for judgment was entered four days later, and recited that it was upon the special verdict rendered by the jury.

*Joseph S. Hunn* for appellant. Plaintiff's request for the direction of a verdict should have been granted. (*Cheever v. P. R. R. Co.*, 150 N. Y. 59; *S. Nat. Bank v. Weston*, 161 N. Y. 520.) Plaintiff, not defendant, was entitled to judgment

on the verdict. (*Bank of Chittenango v. Morgan*, 73 N. Y. 593; *Whitaker v. Brown*, 16 Wend. 505; *Drake v. Elwyn*, 1 Caines, 184; *S. C. Bank v. Alberger*, 101 N. N. 202; *Ex parte Blake*, 1 Ves. 166; *F. C. Nat. Bank v. Widener*, 24 App. Div. 330; 163 N. Y. 276; *Lea v. Guice*, 13 S. & M. 656.)

*Walter S. Hubbell* for respondent.

LANDON, J. "A special verdict is one, by which the jury finds the facts only, leaving the court to determine, which party is entitled to judgment thereupon." (Code Civ. Pro. section 1186.)

"In an action to recover money only, or real property, or a chattel, the jury may render a general or special verdict, in its discretion." (Ib. section 1187.) As there was no objection, it may be assumed that the special verdict was rendered in the discretion of the jury. It is in other cases than those above mentioned that the court may direct the jury to find a special verdict upon all or any of the issues. (Ib.) No motion was pending for a nonsuit or for the direction of a verdict when the questions were submitted to the jury, and, therefore, the questions submitted do not come within the provisions of the section relating to that situation. We assume, therefore, that the questions submitted to the jury covered all the controverted facts deemed by the trial court to be material to the judgment. This is made clear by the charge of the court that if the purchase of the rubber and cement business was made without the knowledge and consent of the defendant Hagen the plaintiff could not recover.

It is thus settled by the answer to the first question that the defendant Hagen was a partner in the firm of F. W. France & Co. when the firm note was given. And by the answer to the second question that the firm note was given as part consideration of the purchase of the rubber and cement business by the firm. Thus both the act of buying and of paying was by the firm. The firm was a party to the entire transaction.

The further finding by the jury that the purchase was not made with the knowledge or consent of the defendant Hagen, is of itself inconsequent. Each partner was the lawful agent of the other in all matters within the scope of the business of the firm. The first and second findings negative the idea that the purchase was made by or for any other person than the firm, or for any other purpose than that of the firm. Presumably, therefore, the purchase was within the scope of the firm business. There is no finding that it was not. There is no room in the findings for the conclusion that France gave the firm note for his individual purpose. And as he gave the note of the firm for firm purposes, it was immaterial whether Hagen knew or consented to the transaction at the time. It is not found that he never ratified it, or that the firm never took over the new business.

We think the judgment should be reversed and a new trial granted, costs to abide the event.

GRAY, O'BRIEN, CULLEN and WERNER, JJ., concur; PARKER, Ch. J., and HAIGHT, J., dissent.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.  
SAMUEL J. KENNEDY, Appellant.

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1. MURDER — EVIDENCE — DECLARATIONS MADE IN PRESENCE OF ACCUSED INCOMPETENT. Upon a trial for murder the testimony of a police officer as to a conversation, in the presence of the defendant, who was in custody, between the witness and another person, tending to show that the latter, after being warned by the witness to be careful in his statements, identified the defendant as the person who was with the deceased the night of the homicide, is hearsay and incompetent, notwithstanding that such person is also a witness on the trial and to some extent corroborates the police officer as to his identifying the defendant, where the defendant, when he undertook to speak and deny that he was the person, was instantly stopped by the police officer and required to keep still.

2. ADMISSIBILITY OF DECLARATIONS MADE IN PRESENCE OF ACCUSED. Declarations or statements made in the presence of accused are not received as evidence in themselves against him, but for the purpose of ascertaining the reply he makes to them. They are only competent when he hears and fully comprehends the effect of the words spoken and when he is at full liberty to make answer thereto, and then only under such circum-

stances as would justify the inference of assent or acquiescence as to the truth of the statement, by his remaining silent.

8. APPEAL — GRANTING NEW TRIAL IN CAPITAL CASE FOR ERROR NOT EXCEPTED TO. The power conferred upon the Court of Appeals by section 528 of the Code of Criminal Procedure to order a new trial when the judgment is of death, if satisfied that the verdict was against the weight of evidence, or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below, may be properly exercised when it is apparent that the defendant has suffered gross injustice by the admission of incompetent evidence upon the main and vital issue, even though the defendant's counsel failed to object to its reception; but the provision of the Code was not intended to relieve counsel of the duty of objecting, and, in case their objection is overruled, of taking an exception, to the admission of incompetent evidence.

4. WHEN NEW TRIAL WILL NOT BE GRANTED. The power conferred by that section upon the Court of Appeals is a power to be exercised or withheld in its discretion, and where that court is satisfied that the accused has had a fair trial and that he is guilty of the crime charged, a new trial will not be granted.

(Argued October 4, 1900; decided November 20, 1900.)

APPEAL from a judgment of the Supreme Court, rendered at a Trial Term for the county of New York March 31, 1899, upon a verdict convicting the defendant of the crime of murder in the first degree, and from an order denying a motion for a new trial.

The facts, so far as material, are stated in the opinion.

*W. W. Cantwell* and *R. M. Moore* for appellant. The admissions claimed to have been made by the defendant were improperly received in evidence. (*People v. McMahon*, 15 N. Y. 384; *Wheater Case*, 2 Moody C. C. 45; *People v. McGloin*, 91 N. Y. 244.) It was error to permit Captain Price to testify to the detailed conversation that he had with Davis and McCurry in the police station relative to the identification of the defendant. It is true that defendant was present at all of the conversation, but he in nowise could be said to have adopted it or be a party to it, either by acquiescence or silence. (*Kelly v. People*, 55 N. Y. 571.)

*Charles E. Le Barbier* for respondent.



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N. Y. Rep.] Opinion of the Court, per HAIGHT, J.

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HAIGHT, J. On the morning of the 16th day of August, 1898, the dead body of Emeline C. Reynolds was found lying upon the floor in room 84 of the Grand Hotel on Broadway in the city of New York. The body was fully dressed, with the exception of the hat which had been removed and was lying in the room. By the side of the body, upon the floor, was found a bludgeon, consisting of a lead pipe about seventeen inches in length, through which an iron rod had been inserted and wound at one end with tape. A post-mortem examination of the body disclosed two wounds upon the top of the head, each about two and one-half inches long, one about an inch behind the other, cutting through the scalp. The lobe of the right ear was found to be discolored, and there was a fracture of the cervical vertebra or neck. No other marks were found upon the body. It appeared to be well nourished, and in other respects in a healthy condition. The physician who conducted the autopsy gave it as his opinion that the wounds were produced by blows upon the head and that death was due to oedema, congestion of the brain, asphyxia resulting from pressure on the spinal cord and fracture of the cervical vertebra; and that death could have been produced from the blows of the bludgeon which was found by her side.

The deceased was a young woman, unmarried, and had formerly lived at Mt. Vernon, where her parents, brothers and sisters still reside. For the last two years she had been living at the corner of Fifty-eighth street and Ninth avenue, in a flat on the first floor, with a New York broker, under the name of Reynolds, as man and wife. On Monday, the day preceding the finding of her body, she left her home in the morning, taking with her a small bag or reticule, and about half-past twelve o'clock she entered the Grand Hotel, went to the desk and registered in the name of "E. Maxwell and wife, Brooklyn," and was assigned by the clerk to room 84 on the fourth floor. She was conducted to this room by a bellboy and left there. At about two o'clock she entered the dining room and was conducted to a table at which she was served with

a lunch. After finishing her lunch she signed the bill therefor with the name of "E. Maxwell, Room 84." A few minutes afterwards she left the hotel by the ladies' entrance on 31st street and did not return until about six o'clock in the afternoon, at which time she was accompanied by a man. They entered the hotel at the entrance from Thirty-first street, passed through the dining room and took the elevator to the room to which she had been assigned. They remained together in the room until about a quarter of seven, when they descended by the elevator to the office floor and passed out through the dining room into Thirty-first street. They again returned to the hotel together about ten minutes before twelve o'clock, passing through the dining room to the elevator and thence to their room. After they returned to their room, a lady occupying room No. 52, which is directly under room 84, heard two persons walking about the room. After some time her attention was attracted by a heavy fall upon the floor in the room above, and this was followed, shortly after, by another fall. After that she heard the walking of one person about the room for some time, but finally fell asleep and observed nothing further until morning. A few minutes after two o'clock the man, who had accompanied the deceased, passed down the stairs of the hotel to the office and thence out through the corridor into Broadway. The body of the deceased was first found by the chambermaid, who entered the room at about half-past nine in the morning.

The evidence establishes beyond a reasonable doubt, and we understand the fact to be conceded by the defendant, that Miss Reynolds had been killed by some person, under circumstances which would justify a jury in finding that the act was committed with deliberation and premeditation. We are thus brought to a consideration of the question as to whether the crime was committed by the defendant. He was a dentist, having an office at No. 60 West Twenty-second street, in the city of New York, in company with his father, who is also a dentist. He was a married man, about thirty-two years of age, and resided at New Dorp, Staten Island, with his parents.

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At the time of the homicide his wife was absent from home on a visit.

Upon disrobing the body of the deceased, in order to make an autopsy, there was found underneath the corset the sum of \$8.90 in money and the following check :

"No. 1226. NEW YORK, *August 15, 1898.*

"The Garfield National Bank, Twenty-third street and Sixth Avenue, pay to the order of Emma Reynolds thirteen thousand dollars (\$13,000). DUDLEY GIDEON."

The check bears a two-cent postage stamp, canceled, and is indorsed upon the back "S. J. Kennedy." There was also found in the room several scraps of paper which had been torn up. Some of the pieces were found in a waste basket in the corner of the room, and some of the scraps were found by the easterly window. These scraps, when put together, formed a complete paper, on which there appears in lithograph in the upper left-hand corner a capital "B;" on the left hand is a line for date with the figures "189-," and underneath are the words "Phillips Milk of Magnesia, 12 oz." On the reverse side of this paper were written the words "E. Maxwell and wife, Grand Hotel."

After finding the check with the defendant's name indorsed upon the back of it, the detectives detailed to investigate the case called upon the defendant at his office, showed him the check and asked him if the signature was his. He stated that it was not ; that he had never seen it before, and that he was not at the Grand Hotel the night before in company with the decedent. He was, however, subsequently placed under arrest and taken to the West Thirtieth street police station; and upon a search of his office there was found a blank check book with a number of checks signed by him, several letters and a pad of paper on which was printed "Phillips Milk of Magnesia, 12 oz.," conforming in every respect to the scraps found in the room of the deceased, to which we have already referred.

Upon a search of the defendant's residence in New Dorp,

there was found in the cellar a piece of lead pipe corresponding in size to that of which the bludgeon had been constructed, and also a piece of iron of the same size as that which had been inserted in the pipe constituting the bludgeon.

The head waiter, his assistant, the bellboy, elevator boy and the front clerk of the Grand Hotel, who saw the man with the deceased, were sworn as witnesses upon the trial and identified the defendant as the man who occupied the room with her on the night of the homicide. As they described him, he wore a straw hat. It appears that previously he had worn a brown derby hat, but testimony was introduced showing that on the afternoon of that day he had purchased a straw hat and a golf cap, the cap being subsequently found in his office and identified by the salesman. Expert witnesses were produced, who, upon comparing the check for \$13,000 found upon the body of the deceased, with papers proved in the case to be written by the defendant, gave it as their opinion that the check was filled out and signed by the defendant, and that the indorsement on the back was his genuine signature. They also gave it as their opinion that the writing, upon the scraps of paper found in the room of the deceased, of the words "E. Maxwell and wife, Grand Hotel," was also that of the defendant.

On the morning preceding the homicide, the defendant put on his wife's undershirt or wrapper. After closing his office in the afternoon, he went to a store and purchased a new suit of underwear consisting of a shirt and drawers, and then returned to his office and put them on. Upon his arrest there was found upon the drawers a dark streak or mark extending from the waistband down toward the knee, which it is claimed was made from the lead pipe or bludgeon hanging inside of his trousers and against his drawers. After he was arrested he was asked by the police as to his whereabouts the evening before, and it is claimed that he made contradictory statements with reference thereto, and materially varied the same on subsequent occasions when questioned upon the subject. Other circumstances of lesser importance were disclosed by the evi-

dence, but we have specifically called attention to all that is necessary to be considered upon this review.

The evidence is of such a character as to require a submission of the case to the jury and thus cast upon that body the responsibility of determining the question of the guilt of the accused. We, however, have called attention to the evidence for the purpose of showing that the testimony given as to the identity of the defendant as the person who occupied the room in the hotel with the deceased on the night of her death related to the chief vital question at issue and was of the utmost importance. Bearing this fact in mind, we proceed to a consideration of the testimony of Captain Price of the police department. After the defendant had been arrested and taken to the police station, the captain testified that he brought in a number of other people and placed them in the room with the defendant; that he then sent for the colored bellboy at the hotel, by the name of Davis, who had served a bottle of wine to the person in room 84. On his arrival he was taken into the room where these persons were congregated and then the captain said to him, "Will you look around this room carefully and see if you can see anybody that resembles that man? I says, Mr. Davis, be awful careful in your judgment. I says, this is a serious matter. It may involve the life of a man, and if you ever exercised care in your life, do it now. He says, there is no use of my looking around this room. I had told him to speak to each individual in the room. He had told me of a conversation that he had had with a man in the hotel about the wine and a corkscrew. I said, speak to every individual in the room, make no mistake as to voice, if there there is any doubt at all, give it to the man you have in mind. He says, Captain, there is no occasion for me to speak to anybody, there is no occasion for me to go around the room. I see the man that I served with a bottle of wine. Where is he? There he is, sitting right over there, walking a few feet and pointing to Kennedy. I stopped him immediately and said, you have made a mistake. Aint it that man, pointing to another man the other side of the room?

Get up and look at him. Aint that the man? No, he said, there is the man that I served with the bottle of wine. Kennedy spoke up and said, I never seen you in my life before. I said, stop, Kennedy, you will understand this a little later on." The captain then proceeded to state that he sent for other persons in the hotel and had them brought over to the police station to see if they could identify the defendant, and among others, stated that Stephen Burns, a waiter at the hotel, next saw the defendant. He looked the people over as they walked around the room and he said that "this man, Kennedy, was the man that he had seen in the hotel." Burns was not sworn as a witness upon the trial, but Davis was, and upon the trial he identified the defendant as the person he had served with wine in room 84 on the night of the homicide and that he went to the captain's office the next day to identify the man. He stated that he looked around the room and noticed that Mr. Kennedy was the gentleman that he served with wine; that he caught his features at once. He also stated that the captain of the dining room was in the captain's room at the same time and that he picked out the defendant before the witness did, but that he was positive that the defendant was the man that he saw in room 84.

We think the captain's testimony, to which we have referred, was hearsay, incompetent and prejudicial to the defendant. He gives us, in considerable detail, the conversation that took place between himself and the colored bellboy in which he took great pains to instruct the boy with reference to his duty, the care that he should take, and his replies thereto, all tending to show that the boy was certain as to the identity of the defendant. It is true that this conversation took place in the room in which the defendant sat, in company with a number of other persons, but when the defendant undertook to speak and deny that he was the person, he was instantly stopped by the captain and required to keep still.

There are circumstances under which the declarations of persons made in the presence of the accused are competent, but they are regarded as dangerous and should always be

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received with caution and should not be admitted unless the evidence clearly brings them within the rule. Declarations or statements made in the presence of a party are not received as evidence in themselves, but for the purpose of ascertaining the reply the party to be affected makes to them. They are only competent when the person affected hears and fully comprehends the effect of the words spoken and when he is at full liberty to make answer thereto, and then only under such circumstances as would justify the inference of assent or acquiescence as to the truth of the statement, by his remaining silent. (Wharton Law of Evidence, sections 1136, 1137; Greenleaf on Evidence, sections 197-199; *People v. Koerner*, 154 N. Y. 355, 374; *Kelley v. People*, 55 N. Y. 565; *Gibney v. Marchay*, 34 N. Y. 301, 305; *People v. Willett*, 92 N. Y. 29.) The defendant, as we have seen, was not permitted to reply, but was required to keep silent. His silence, therefore, could not, under the circumstances, be construed into an acquiescence or an admission of the truth of the matters embraced in the statement. The police officer could not tell whether Davis or Burns recognized the defendant further than by the statements made by them at the time when neither were under oath. Burns has not been sworn as a witness and we have no means of knowing whether he did, in fact, identify the defendant other than his unsworn statement made to the police. Davis, it is true, was sworn upon the trial and to some extent corroborated the police officer as to his identifying the defendant at the police station, but his declarations made at that time in reply to the instructions given him by the officer were not evidence and did not tend, under the circumstances, to establish an admission on the part of the defendant that he was the person who had been in the room with the deceased. No objection was taken by the defendant's counsel to the evidence referred to, and, consequently, there is no exception which presents an error of law upon which a reversal of the judgment can be founded. Section 528 of the Code of Criminal Procedure, however, provides that "When the judgment is of death, the Court of

Appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below." This provision of the Code gives to this court the power, in its discretion, to order a new trial when, in its opinion, justice requires it. This power may be properly exercised when it is apparent that the defendant has suffered gross injustice by the admission of incompetent evidence upon the main and vital issue, even though the defendant's counsel has failed to object to its reception. The provisions of the Code, however, were not intended to relieve counsel from the duty of objecting and in case their objection is overruled of taking an exception to the admission of incompetent evidence. Counsel cannot be permitted to impliedly consent to the admission of evidence by remaining silent when it is offered and then insist that it is incompetent and that an error has been committed. No error of law is presented for review unless a question is raised by an exception. The legislature has seen fit to invest this court with the power to grant a new trial. It is a power to be exercised or withheld in its discretion. Before a judgment of death is carried into execution this court must be satisfied that the accused has had a fair trial and that he is guilty of the crime. If it is so satisfied, the power will not be exercised. If it is not satisfied, then it will avail itself of the power given. As we have seen, the incompetent evidence bore upon the chief vital question at issue. It is of that character which must have had an important bearing upon the minds of the jurors, and, we fear, in a measure influenced their verdict. We think, therefore, that justice will be promoted by the granting of a new trial.

The judgment and conviction should be reversed and a new trial ordered.

PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN and LANDON, JJ., concur.

Judgment of conviction reversed, etc.



THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.  
LORENZO PRIORI, Appellant.

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1. MURDER — QUESTIONS OF FACT. The question of the credibility of the People's witnesses in a trial for murder, and the question whether the decedent was killed by the defendant, and if so, whether the act was committed under circumstances constituting the crime of murder in the first degree, are clearly for the jury, where, if such witnesses are to be believed, there is not only ample proof of circumstances tending to show that the decedent was killed by the defendant, but there is direct proof to the same effect.

2. DUTY OF COURT TO SUSTAIN PRIVILEGE OF WITNESS. Where, under the circumstances, the trial court is justified in informing a witness called by the defendant of his constitutional privilege to decline to answer any question that would tend to incriminate or degrade him, and it is manifest that he personally declined to answer upon such grounds, it is its duty to sustain his privilege, if the evidence on his examination as a witness would either tend to incriminate him or disclose a link in the chain of testimony which might convict him of crime, and he is not required to explain how he might be incriminated by the answer; and before the defendant can claim its ruling to be erroneous, he must at least show such facts as will render it clear that an answer to the question propounded would not incriminate or disgrace the witness.

3. WHEN ERROR IN SUSTAINING WITNESS' CLAIM OF PRIVILEGE NOT PREJUDICIAL. Sustaining the claim of privilege, interposed by a witness brought into court from prison, to a question asked him by defendant in a murder trial, as to whether he heard a witness for the state say to defendant while in the prison that he knew nothing about the case, even if error, is not ground for reversing a conviction where the witness for the state had admitted that he made such a statement to the defendant, and that fact is undisputed.

4. DECLARATIONS BY DISTRICT ATTORNEY AS TO THE LAW OF THE CASE. The misconduct of the district attorney in assuming to state the law upon the question of premeditation and deliberation, and in persisting in making such statements after the court had instructed him not to continue the discussion, is not sufficient cause for reversal of a conviction, where the court distinctly and plainly instructed the jury upon the question of premeditation and deliberation, and also instructed it to disregard any matter that had been stated as to the law, or what the law should be, and any statements made in regard to any opinions or decisions of the courts, except such as should be made by the trial judge.

5. IMPROPER COMMENTS BY DISTRICT ATTORNEY. Statements by the district attorney in his address to the jury as to the law of defendant's

native country, to the effect that the crime of murder was less seriously punished in that country, are rendered harmless, and should be disregarded by the Court of Appeals, where the district attorney withdrew his remarks on that subject, when the defendant objected to them, and the court expressly directed the jury to disregard them.

6. COMMENTS ON DEFENDANT'S FAILURE TO TESTIFY. Any error resulting from comments by the district attorney, upon the failure of defendant in a murder trial to testify in his own behalf, is cured where the trial court, at the defendant's request, calls the attention of the jury to the provisions of section 393 of the Code of Criminal Procedure, and charges them that while the defendant in all cases may testify in his own behalf, still, his neglect or refusal to do so does not create any presumption against him.

7. MISCONDUCT OF JURY IN MURDER TRIAL — WHEN REFUSAL OF NEW TRIAL JUSTIFIED. The trial court is justified in denying an application for a new trial made by defendant in a murder trial, so far as it is based upon the ground that during the trial one of the jurors had a copy of the Penal Code and Code of Criminal Procedure which he read and exhibited to some of his fellows, where it is obvious that he obtained the book inadvertently, and as soon as the attention of the prosecution was called to the fact the book was taken away from him, and the defendant omitted to raise any objection, or make any request to the court to specially instruct the jurors to disregard anything that had been read, and it is not alleged or set forth what was read, or that it had any connection with, or bearing upon, the case, or in any way affected the verdict, and the court in effect charged the jury that it was to receive the law as the court declared it, independent of any knowledge it might otherwise acquire.

8. NEW TRIAL ON GROUND OF NEWLY-DISCOVERED EVIDENCE. An application for a new trial in a murder case, upon the ground of newly-discovered evidence, may properly be refused where the new evidence is not such as requires the trial court to hold that it would probably change the result if a new trial were granted, or where there is not sufficient proof that it could not have been discovered before the trial by the exercise of due diligence.

(Argued October 5, 1900; decided November 20, 1900.)

APPEAL from a judgment of the Supreme Court, rendered at a Trial Term for the county of New York April 28, 1899, upon a verdict convicting the defendant of the crime of murder in the first degree, and from an order denying a motion for a new trial.

The facts, so far as material, are stated in the opinion.

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Points of counsel.

*Bankson T. Morgan* and *Samuel Seabury* for appellant. The court erred in not compelling the witness *Di Angelo* to testify. (2 Story on Const. § 1792; 4 Black. Comm. 359, 360; *People v. Willard*, 92 Cal. 482; *Aiken v. State*, 25 S. W. Rep. 840; 1 Thomp. on Trials, § 306; *People v. Mather*, 4 Wend. 229; *People v. Bodine*, 1 Den. 281; *Ward v. People*, 6 Hill, 144; *People v. Carroll*, 3 Park. Cr. Rep. 73; *Southard v. Rexford*, 6 Cow. 254.) A witness can only claim his privilege when the answer to the question asked would naturally and ordinarily have a tendency to incriminate or degrade him. (*Youngs v. Youngs*, 5 Redf. 505; *Friess v. N. Y. C. & H. R. R. Co.*, 67 Hun, 205; *People ex rel. v. Kelly*, 24 N. Y. 74.) The remarks of the prosecuting officer in his closing address to the jury were unfairly prejudicial to the defendant. (*Berry v. State*, 10 Ga. 511; *Bullock v. Smith*, 15 Ga. 395; *State v. Williams*, 65 N. C. 505; *Tucker v. Henniker*, 41 N. H. 317; *Bagully v. M. J. Assn.*, 38 App. Div. 522; *Cole v. F. B. C. Co.*, 159 N. Y. 59; *People v. Fielding*, 158 N. Y. 542.) The counsel for the prosecution was erroneously allowed to argue and mis-state the law to the jury. (1 Thomp. on Trials, §§ 942, 980; *State v. Reed*, 71 Mo. 200; *People v. Majone*, 91 N. Y. 211.) The counsel for the People improperly and persistently commented, directly and indirectly, upon the failure of the defendant to testify in his own behalf in such a manner as to prejudice the jury against the defendant because of his failure to testify. (Code Crim. Proc. § 393; *Dawson v. State*, 24 S. W. Rep. 414; *People v. Fielding*, 158 N. Y. 542; *Angelo v. People*, 96 Ill. 209; *Koelges v. G. L. Ins. Co.*, 57 N. Y. 638; *Williams v. B. E. R. Co.*, 126 N. Y. 96; *McKeever v. Weyer*, 11 Wkly. Dig. 258; *Halpern v. N. E. R. R. Co.*, 16 App. Div. 90; *Bagully v. M. J. Assn.*, 38 App. Div. 522; *People v. Corey*, 157 N. Y. 332.) The fact that some of the jurors during the trial read a copy of "Silvernail's Penal Code and Code of Criminal Procedure," annotated, constituted misconduct by which a fair and due consideration of the case was prevented. (*Jones v. State*, 89 Ind. 82; *Harrison v. Hance*, 37 Mo. 185; *Alm*

v. *Andrews*, 9 Ohio C. C. 591; *Burrows v. Minner*, 1 C. & P. 310; *Merrill v. Nary*, 92 Mass. 416; *State v. Smith*, 6 R. I. 33; *Newkirk v. State*, 27 Ind. 1; *Johnson v. State*, 27 Fla. 245; *People v. Hartung*, 4 Park. Cr. Rep. 256, 314; *People v. Draper*, 28 Hun, 1.) The lower court erred in not granting defendant's motion for a new trial upon the ground of newly-discovered evidence. (*W. S. P. Co. v. Barclay*, 14 N. Y. S. R. 879; *Holmes v. Rogers*, 32 N. Y. S. R. 470; *Guyot v. Butts*, 4 Wend. 579.)

*Charles E. Le Barbier* for respondent. The defendant's motion for a new trial and in arrest of judgment on the ground of misconduct of the jury was properly denied. (*People v. Draper*, 28 Hun, 1; *People v. Wilson*, 8 Abb. Pr. 137; *People v. Gaffney*, 14 Abb. Pr. [N. S.] 36; *People v. Kelly*, 2 N. Y. Cr. Rep. 15; *People v. Schad*, 58 Hun, 571.) The defendant's motion for a new trial and in arrest of judgment on the ground that the closing address of the district attorney to the jury was unfairly prejudicial to the defendant was properly denied. (2 Ency. of Pl. & Pr. 722; *People v. Fielding*, 158 N. Y. 542; *People v. Greenwall*, 115 N. Y. 526.) The defendant's motion for a new trial on the ground of newly-discovered evidence was properly denied, for the reason that it does not appear that the result would have been different than what it was, even had the newly-discovered evidence been produced upon the trial. (*People v. Hovey*, 30 Hun, 354; 93 N. Y. 654; *People v. Shea*, 16 Miss. 111; *Cuse v. People*, 6 Abb. [N. C.] 151; *People ex rel. v. Sup. Ct.*, 10 Wend. 285; *Williams v. People*, 45 Barb. 201; *People v. Mack*, 2 Park. Cr. Rep. 673; *People v. McGuire*, 2 Hun, 269.)

MARTIN, J. The judgment appealed from was entered upon the verdict of a jury rendered upon a trial in the Supreme Court, held in the city and county of New York. At the close of the evidence of the prosecution the defendant asked the court to withdraw from the consideration of the jury

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the charge of murder in the first degree upon the grounds that the People had not proved facts sufficient to warrant the jury in finding that the defendant had committed that crime, and "that the People have not proved facts sufficient to sustain the crime beyond a reasonable doubt." This motion was denied and the defendant excepted. At the close of all the testimony the defendant's counsel again moved to take from the consideration of the jury the charge of murder in the first degree upon the same grounds, and also upon the additional grounds "That the preponderance of evidence shows that the defendant was not guilty of said crime," and "That the testimony given by the People to sustain the burden of proof of said crime is wholly or in part illegal." He also moved the court to direct the jury to acquit him of the crime of murder in the second degree, and of the crime of manslaughter. These motions were all denied, and the defendant excepted.

The first question presented by the defendant's exceptions relates to the sufficiency of the evidence to justify the submission to the jury of the question of the defendant's guilt of the crime charged in the indictment. A careful examination of the record renders it obvious that the proof was sufficient to require the court to submit that question to the jury. If the People's witnesses were to be believed, there was not only ample proof of circumstances which tended to show that the decedent was killed by the defendant, but there was direct proof to the same effect.

Under that evidence the question of the credibility of witnesses and the question whether the decedent was killed by the defendant, and if so, whether the act was committed under circumstances constituting the crime of murder in the first degree were clearly for the jury. (*People v. Kerrigan*, 147 N. Y. 210; *People v. Youngs*, 151 N. Y. 210, 216; *People v. Kelly*, 113 N. Y. 647, 648; *People v. Fish*, 125 N. Y. 136, 144; *People v. Constantino*, 153 N. Y. 24, 35; *People v. Ferraro*, 161 N. Y. 365, 376.)

No good purpose can be served by reviewing or stating in detail the facts and circumstances established by the evidence,

as there can be no reasonable doubt that the proof was sufficient to present a question of fact as to whether the defendant was guilty of the crime of which he was convicted. Hence we content ourselves with the statement that, after a careful examination of all the evidence, we have reached the conclusion that it was sufficient to justify the court in submitting that question to the jury and to uphold its verdict.

Other questions are presented by certain exceptions taken upon the trial and by the action of the trial court in denying the defendant's motions for a new trial based both upon alleged legal errors and upon the ground of newly-discovered evidence.

Upon the trial one Messina, called as a witness for the People, on his cross-examination, testified that he visited the defendant while in prison, and admitted that he stated to him that he would not testify against him because he saw nothing. The defendant afterwards called as a witness one Di Angelo, who, at the time of that conversation, was a prisoner in the Tombs under an indictment for the crime of murder in the first degree, and who was brought into court to testify. The court thereupon directed that his attorney should be present to advise him in regard to his rights as a witness. Afterwards the attorney stated to the court that he had seen the witness and informed him as to his rights. The witness then declined to be sworn. The court, however, directed him to take the oath, and stated that it would see that his rights were preserved. It then informed him that he could decline to answer any question that might be put to him. It appears to have been conceded that he was under indictment for the crime of murder in the first degree; that he was in actual confinement, and was brought into court by its order. The counsel for the defendant then proceeded to examine him. The court in effect instructed the witness that he might decline to answer any question where the answer would tend to incriminate or degrade him. The defendant's questions were as follows: "You are at present a prisoner in the Tombs?" "Did you, some time during the month of January, 1899, in Cell 69, meet one Antonio Messina and Mrs. Priori, and at the time the defendant Priori

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was in the same cell?" "Did you on that occasion hear Antonio Messina say that he knew nothing about the case in which Priori was defendant, or anything to that effect?" The witness declined to answer any of these questions upon the ground that the answer would tend to incriminate or degrade him. The defendant's counsel then asserted that his refusal was not the voluntary act of the witness, but resulted from a statement by the court, and for that reason an exception was taken. To this the court replied: "I asked him if he put his ground upon his constitutional rights, putting his constitutional rights to him. If you wish an exception to that you may have it." The defendant's counsel still desired to have his exception noted, and the court then remarked: "I informed him of his constitutional rights, and if he places his refusal on that, I have got to sustain it." To that ruling an exception was taken. The defendant now contends that the privilege of declining to answer these questions upon the ground that the answers would degrade or incriminate the witness, was personal to him, and that it was error not to require him to answer. The contention that the privilege was personal to the witness is perhaps correct, but, under the circumstances disclosed, the court was justified in informing the witness of his rights, and when thus informed, it is manifest that he personally declined to answer upon the grounds stated.

Assuming, as I think we must, that the witness personally claimed his privilege, the question is whether the court was justified in according it to him. Whether such privilege should be allowed or disallowed rested somewhat in the discretion of the court. Where a court can discover from the circumstances that the giving of evidence upon a certain subject may tend to incriminate or disgrace a witness, it has the right and it is its duty to sustain his privilege. Before the defendant could claim that this ruling was erroneous he was at least required to show such facts as would render it clear that an answer to the questions propounded would not incriminate or disgrace the witness. We think the record is insufficient to establish that fact. It was for the court to determine

whether, under all the circumstances, the witness should be accorded the protection and privilege he invoked. It does not follow that the witness was not entitled to his privilege, because, upon the face of the question when unexplained, it did not appear that the answer would have the effect claimed. He was entitled to this privilege if the evidence or his examination as a witness would either tend to incriminate him or disclose a link in the chain of testimony which might convict him of crime, and was protected without being required to explain how he might be incriminated by the answer. We think, under all the circumstances, whether this witness should have been required to answer the questions propounded was for the trial court to determine and rested largely in its discretion. Where such a privilege is claimed the courts have recognized the impossibility in most cases of anticipating the effect of an answer. (*People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 231.)

Moreover, the obvious purpose of the defendant's interrogatories was to prove that the witness Messina, at the time referred to, said that he would not testify against the defendant because he saw nothing. That fact had already been proved by the witness Messina and it was undisputed. Therefore, even if it were conceded that the defendant was entitled to prove what occurred in the Tombs when Messina was there and that he said he would not testify against the defendant because he knew nothing, it could not have affected the result or the credibility of the witness. The witness himself having sworn to that fact which was undisputed, the defendant had the benefit of the evidence as fully as though it was also proved by the witness called. We are, therefore, of the opinion that the rulings of the court upon this subject did not constitute error which would justify us in disturbing the judgment below.

The defendant also claims that the remarks of the district attorney in his address to the jury were unwarranted, prejudicial to him, and of such a character as to require the granting of a new trial. We have carefully examined them as set forth in the record, but are unable to find any statement which



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was unwarranted, or was not a fair argument, comment or appeal to the jury except in the respects hereinafter specified. "It is the privilege of counsel in addressing a jury to comment upon every pertinent matter of fact bearing upon the questions which the jury have to decide. This privilege it is most important to preserve, and it ought not to be narrowed by any close construction, but should be interpreted in the largest sense. \* \* \* The jury system would fail much more frequently than it now does if freedom of advocacy should be unduly hampered and counsel should be prevented from exercising within the four corners of the evidence the widest latitude by way of comment, denunciation or appeal in advocating his cause. This privilege is not beyond regulation by the court. It is subject to be controlled by the trial judge in the exercise of a sound discretion, to prevent undue prolixity, waste of time or unseemly criticism. The privilege of counsel, however, does not justify the introduction in his summing up of matters wholly immaterial and irrelevant to the matter to be decided, and which the jury have no right to consider in arriving at their verdict." This is the language of Judge ANDREWS in *Williams v. Brooklyn El. R. R. Co.* (126 N. Y. 96, 102). Applying this rule as well as that stated in the case of *People v. Fielding* (158 N. Y. 542) it is manifest that the district attorney did not transcend the proper limits of advocacy in his address to the jury, except in the two respects which we will now consider.

*First*, while summing up, the prosecuting officer, in discussing the question of premeditation and deliberation, commenced to state what had been decided upon that subject by this court. To this the defendant's counsel objected upon the ground that it was a question of law and was incorrectly stated, when the court remarked that it would at the proper time instruct the jury as to the law upon the subject. The district attorney, however, persisted in declaring what the law was and what had been decided, whereupon the court instructed the jury that they should take the law as the court laid it down and that anything that was said in regard to it

by counsel on either side the jury were to disregard, except as it was restated by the court. To that the defendant excepted. The counsel for the People still continued to call the attention of the jury to the law, when the court said, "I would not discuss it," adding that remarks in regard to the law were to be made by the court. The district attorney, however, still persisted in stating the law to the jury, notwithstanding the advice of the court to desist from further arrogating to himself the duty which obviously rested upon it and not upon the district attorney. To this the defendant again objected, and the court replied that he was entitled to the objection, adding that it was the discussion only of settled legal questions, that they were matters for the court and not for the counsel, and that the inferences might be as claimed, but that the law was for the court. We are unable to justify the course pursued by the district attorney in disregarding the proper suggestions of the court. Yet, we think his action does not present reversible error, because the court distinctly and plainly instructed the jury upon the question of premeditation and deliberation, and also instructed it to disregard any matter that had been stated as to the law or what the law should be, and any statement made in regard to any opinion or decision of the courts, except such as should be made by the trial judge. Here was not only a plain statement of the law upon the subject as to which the district attorney sought to instruct the jury instead of permitting the court to do so, but it also directed the jury to disregard any statements which had been made as to what the law was or as to the opinion or decision of any court, except so far as the trial court laid down the law in its charge. Therefore, while the action of the district attorney was not seemly or to be commended, yet, we think it was insufficient to constitute an error which affected the substantial rights of the defendant. It was at most technical, and under section 542 of the Code of Criminal Procedure we are required to disregard it.

*Second.* The only other respect in which the district attorney transcended proper limits in his address was in his statement as to the law of the defendant's native country. His

remarks upon that subject were as follows: "It was said by the gentleman who preceded me that the difficulty to which reference was made by the testimony in this case was of too trifling a character to consider it a motive. There is nothing in that contention. These people are impulsive. Upon the slightest provocation human life is sacrificed. Without desiring to prejudice you against him because of his race — and I beg you not to be prejudiced against him because of that — yet that regard for human life is not with them as it is with us. Here when the divine command, 'Thou shalt do no murder,' is transgressed, a life must be expiated for a life, but in the kingdom from whence he comes to murder there simply means a penalty for twenty years in a prison." There was no proof in the case to sustain those statements, and if uncorrected or not withdrawn they might have justified a reversal. But examining the record, we find that when the defendant objected to them the district attorney withdrew his remarks upon that subject and the court expressly directed the jury to disregard them. We think this was a sufficient withdrawal and direction by the court to remedy or remove any error flowing from the statements referred to, that the error, if any, was merely technical and should be disregarded upon this appeal. (*Chesebrough v. Conover*, 140 N. Y. 382, 388; *Marks v. King*, 64 N. Y. 628; *Platner v. Platner*, 78 N. Y. 90; *Gall v. Gall*, 114 N. Y. 109, 121; *Holmes v. Moffat*, 120 N. Y. 159; *Blashfield v. E. S. Tel. & Tel. Co.*, 147 N. Y. 520, 527; *People v. Schooley*, 149 N. Y. 99, 103; *People v. Wilson*, 141 N. Y. 185, 191; *Greenfield v. People*, 85 N. Y. 75, 90; *Cole v. Fall Brook Coal Co.*, 159 N. Y. 59.)

It is further contended that the district attorney improperly and persistently commented directly and indirectly upon the failure of the defendant to testify in his own behalf, and that such comments were prejudicial to him. This criticism is not justified by the record. In that respect he kept well within the evidence, and his comments were proper. Moreover, at the defendant's request the court called the attention of the jury to the provisions of section 393 of the Code of Criminal

Procedure, and charged that while the defendant in all cases may testify in his own behalf, still, that his neglect or refusal to do so does not create any presumption against him. This, under the doctrine of *Ruloff v. People* (45 N. Y. 213), corrected any error of the nature claimed, if it existed.

Another contention of the defendant is that during the trial one of the jurors had a copy of the Penal Code and Code of Criminal Procedure, which he read and exhibited to some of his fellows. As soon, however, as the attention of the prosecution was called to the fact, the book was taken from the juror. The defendant omitted to raise any objection, or make any request to the court to specially instruct the jurors to disregard anything that had been read. No attention was given to this incident, although known to the defendant, until the trial was ended and an adverse decision had been reached. If he regarded this matter as prejudicial to him, good faith required that he should at least call the attention of the court to the fact so that any effect, or supposed effect, of the act might be corrected and removed by proper instructions from the bench. This was not done, presumably because the defendant, like the prosecution, did not regard it of sufficient consequence to require any special action, or think that it in any way prejudiced the rights of the parties. In the latter conclusion we concur. This transaction was made one of the grounds upon which the defendant, before sentence, moved for a new trial. What was read, or that it had any connection with or bearing upon this case, or in any way affected the verdict, is not alleged or set forth. In *People v. Draper* (28 Hun, 1), where the jury obtained possession of a copy of the Revised Statutes while deliberating upon their verdict, it was held that their obtaining it was an irregularity but did not vitiate the verdict, unless it was shown that the defendant was prejudiced thereby. The cases cited in the opinion in that case seem to justify the conclusion there reached. We are of the opinion that while reading the Code by the jurors may be regarded as irregular and as misconduct on their part, yet, as there is no proof that it in any way affected the result

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or was prejudicial to the defendant, the court below was justified in denying his application for a new trial so far as it was based upon that ground. None of the jurors called for books, and none were furnished them. It is quite obvious from the affidavits that the book they obtained was inadvertently left within their reach, without any design that it should come to their hands, and there is no proof as to what portion of either the Penal Code or Code of Criminal Procedure they read or in any way discussed. Under these circumstances, we think the action of the jurors did not constitute such an irregularity or such misconduct as required the court to grant a new trial. (*People v. Gaffney*, 14 Abb. Pr. R. [N. S.] 36.)

There is still another circumstance which renders it apparent that no substantial injury to the defendant could have resulted from this action of one or more of the jurors, which is, that the court in effect charged the jury that it was to receive the law as the court declared it, independent of any knowledge it might otherwise acquire.

The only other ground upon which the defendant bases this appeal is that the court below erred in not granting a new trial upon the ground of newly-discovered evidence. The affidavit upon which this application was based was to the effect that on Sunday, December 11, 1898, the day of the homicide, at about six o'clock P. M., one Napoleone Dei Medici, was on Broome street between Sullivan and Thompson streets, and within about ten feet of the stoop to the drug store at No. 530 Broome street; that he heard two pistol shots fired from behind him; that he looked around and saw a short man run down the steps of No. 526½ Broome street and jump upon a car then passing through that street; that at the time the shots were fired he saw Lorenzo Priori standing on the stoop in front of the drug store, and that he knew that Priori did not fire the shots that he heard; that after hearing the shots he went on his way towards Sullivan street; that when he saw the defendant he had his back towards Thompson street and had both of his hands in his pockets; that he had known the defendant by sight for several years

before the day of the shooting; that he did not at that time remember the defendant's name; that he saw two policemen after the shooting come from Sullivan street to Broome street, but did not wait to see what happened; and that the defendant and the person whom he saw run down the steps and get upon the car were the only persons he saw upon the street at the time of the shooting.

The rule applicable to the determination of the question whether a new trial should be granted upon the ground of newly-discovered evidence is quite correctly stated in the appellant's brief as follows:

"Newly-discovered evidence in order to be sufficient must fulfill all the following requirements: 1. It must be such as will probably change the result if a new trial is granted; 2. It must have been discovered since the trial; 3. It must be such as could have not been discovered before the trial by the exercise of due diligence; 4. It must be material to the issue; 5. It must not be cumulative to the former issue; and, 6. It must not be merely impeaching or contradicting the former evidence."

If it be assumed that this evidence has been discovered since the trial, that it would be material to the issue, would not be cumulative, nor merely impeach or contradict former evidence, still, we think it is not such as required the court below to hold that it would probably change the result if a new trial was granted. Nor do we think there was sufficient proof that it could not have been discovered before the trial by the exercise of due diligence. Under these circumstances, assuming the law as stated by the defendant, the trial court was justified in denying this motion, and its action in that respect must be affirmed.

Having thus briefly stated the views of this court upon all the questions raised by the defendant, and having found no error which would justify the court in disturbing the judgment appealed from, it follows that it should be affirmed.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN and LONDON, JJ., concur.

Judgment of conviction affirmed.

SOCIALISTIC CO-OPERATIVE PUBLISHING ASSOCIATION, Respondent, v. HENRY KUHN et al., Appellants.

CONTEMPT — WHEN ONE PAYMENT OF FINE IMPOSED UPON SEVERAL DEFENDANTS FOR A CIVIL CONTEMPT IS A SATISFACTION AS TO ALL — CODE CIV. PRO. § 2284, SUBD. 2. Where a motion is made to punish several defendants for a civil contempt in willfully disobeying an injunction order directed to and issued against all the defendants proceeded against, and an order adjudging them guilty of such contempt does not state the actual loss or injury of the plaintiff, nor any items from which the amount thereof may be computed or inferred, under subdivision 2 of section 2284 of the Code of Civil Procedure, a single fine of \$250 may be imposed upon all of the defendants served in the proceeding, for which each defendant is severally liable, and in default, any one and all are liable to imprisonment, but one payment is a satisfaction as to all.

*Socialistic Co-op. Pub. Assn. v. Kuhn*, 51 App. Div. 579, modified.

(Argued October 1, 1900; decided November 20, 1900.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 7, 1900, affirming an order of Special Term adjudging the appellants guilty of contempt in disobeying an order enjoining them from publishing, during the pendency of the action, a newspaper under the name *The People*, resembling in appearance the newspaper of the same name published by the plaintiff, and imposing a fine of \$250 upon each of the appellants, and in default of payment within thirty days by any one of said appellants, directing the sheriff to commit him to the common jail and detain him therein until payment or discharge according to law.

The Appellate Division allowed the appeal and certified the following question of law:

“Where a motion is made to punish several defendants for a civil contempt in willfully disobeying an injunction order directed to and issued against all the defendants proceeded against, can each defendant so proceeded against, if found guilty of such contempt, be ordered to pay a fine of \$250 by way of punishment and ordered committed until the fine is paid?”

*Benjamin Patterson* for appellant. There was no power in the court below to fine the four defendants adjudged in contempt the aggregate sum of \$1,000. (*People v. Ct. of Oyer & Term.*, 101 N. Y. 245; *People v. Aitken*, 19 Hun, 327; *Conover v. Wood*, 6 Duer, 682; *Sudlow v. Knox*, 7 Abb. [N. S.] 411; *Moffat v. Herman*, 116 N. Y. 131; *De Jonge v. Brunneman*, 23 Hun, 332; *Powers v. Vil. of Athens*, 19 Hun, 171; *Matter of City of Brooklyn*, 148 N. Y. 107.) The court not having power under the Code to inflict four fines in one proceeding for the same violation by four defendants acting together, the whole order must fail. (*Douglas v. Halstead*, 11 App. Div. 10.)

*Simon Sultan* for respondent. The question certified to this court on this appeal should be answered in the affirmative. (*Sudlow v. Knox*, 4 Abb. Ct. App. Dec. 326; 1 Fiero on Spec. Proc. [2d ed.] 642, 643, § 2284; *H. Mfg. Co. v. Venner*, 74 Hun, 458; *King v. Barnes*, 113 N. Y. 477; *People ex rel. v. Ct. of Oyer & Term.*, 101 N. Y. 247; *Ray v. N. Y. B. E. R. R. Co.*, 155 N. Y. 102; *J. M. Agency v. Rothschild*, 155 N. Y. 255; *Mahon v. Mahon*, 5 Civ. Pro. Rep. 58; *Pitt v. Davison*, 37 N. Y. 235; *R. L. Co. v. Brigham*, 1 App. Div. 490; *Clark v. Bininger*, 75 N. Y. 344.)

LANDON, J. The order appealed from adjudges that the "misconduct and contempt of said defendants was calculated to and did defeat, impair, impede and prejudice the rights and remedies of the plaintiff," thus employing the language of section 14 of the Code of Civil Procedure defining what constitutes a civil contempt in the cases therein specified, and also of section 2266 prescribing the proceedings for its punishment. But the order does not otherwise state the actual loss or injury of the plaintiff, nor does it state any items from which the amount thereof may be computed or inferred, and in this respect the case is unlike *Clark v. Bininger* (75 N. Y. 344). The question certified must be considered in connection with the order appealed from. Section 2284 prescribes the amount of the fine to be imposed. It provides for two cases:



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(1) "If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, \* \* \* a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. \* \* \*

(2) "Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner." Thus, where the amount of actual loss or injury is established, the amount of the fine must be sufficient to indemnify the aggrieved party. Proof of the amount of damages must be made. (*Sudlow v. Knox*, 7 Abb. [N. S.] 411; *Moffat v. Herman*, 116 N. Y. 131.) But "Where it is not shown that *such* an actual loss has been produced" the fine cannot exceed two hundred and fifty dollars besides costs and expenses.

The contempt is a private one. (*People ex rel. Munsell v. Court of Oyer and Terminer*, 101 N. Y. 245.) It consists of the joint or united action of the defendants with others in publishing a newspaper in disobedience of the order of the court. The fine when collected must be paid to the plaintiff. In the absence of a finding or recital in the order of the actual amount of the plaintiff's damages, or such proofs in the record of their actual amount as would clearly show the amount which the Special Term could have rightfully assumed, the actual damages must be regarded as not exceeding two hundred and fifty dollars, besides costs and expenses.

If the amount of the damages had been proved and fixed, the aggregate fine upon all the defendants could not have exceeded the fixed amount. "Sufficient to indemnify the aggrieved party" is the specification; exemplary damages are thus excluded. The liability of the defendants in such a case can no doubt be made joint and several, but one satisfaction is enough.

The same rule should apply where the amount of the dam-

ages is not shown, and the fine not exceeding two hundred and fifty dollars is permitted. Clearly, if the plaintiff seeks a larger sum from the offenders he should show his actual right to it.

The plaintiff urges that each defendant is guilty, and is, therefore, liable to a separate fine. If the proceeding were for a criminal contempt, where the state would be the beneficiary of the fine, the case would be different. But in the case of unproven damages, to extort money from the joint offenders beyond the amount fixed by the statute and award it to the plaintiff, is to permit, and perhaps to invite, extortion beyond the requirements of just compensation or indemnity, and to reward the omission of exact proof by multiplying the maximum reward by the number of the offenders. We decline to adopt a construction which would thus substitute exemplary damages for compensatory damages, which are provable to a reasonable certainty.

The question certified should be answered in the negative, with this qualification: A single fine of two hundred and fifty dollars could be imposed upon all of the defendants served in this proceeding, for which each defendant would be severally liable, and in default of payment any one and all would be liable to imprisonment, but one payment would be satisfaction as to all.

The order appealed from should be modified accordingly, with costs to the appellants.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ., concur.

Ordered accordingly.

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PASQUALE CAPONIGRI, Respondent, v. PASQUALE ALTIERI et al., Appellants.

1. APPEAL — NON-REVIEWABLE ORDER OF APPELLATE DIVISION GRANTING NEW TRIAL. An order of the Appellate Division granting a new trial in an action tried before a jury, where there is a conflict in the evidence and the order may have been based upon the insufficiency of the evidence, is not reviewable by the Court of Appeals, unless it appears from the record that the order denying a new trial was affirmed as to the facts or the appeal therefrom dismissed.

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Statement of case.

**2. ALLOWANCE OF APPEAL FROM NON-REVIEWABLE ORDER DOES NOT AFFECT ITS DISPOSITION.** The allowance by the Appellate Division of an appeal to the Court of Appeals does not require the adoption of any different rule in determining the questions thus brought before it from that enforced in ordinary cases where no such allowance is necessary, and where the appeal is from an order not reviewable, it must be dismissed notwithstanding its allowance.

*Caponigri v. Altieri*, 29 App. Div. 304, appeal dismissed.

(Argued October 8, 1900; decided November 20, 1900.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 23, 1898, reversing a judgment rendered by the Appellate Term and granting a new trial.

This action was commenced in the City Court of New York. It was upon a promissory note made on or about December 28, 1893, by the defendant Pasquale Altieri for one thousand dollars, and was payable to the order of Pietro Altieri, who indorsed the same before maturity. It was transferred to the plaintiff, who at the commencement of the action was the lawful owner and holder thereof.

The answer admitted the making of the note, but denied it was for value. It admitted the indorsement before maturity, denying, however, that the plaintiff was the lawful owner and holder. As a separate and distinct defense and by way of counterclaim, the defendants alleged that the note was not given for a legal consideration, but represented a part of the principal sum secured by a previous note for three thousand dollars and various sums usuriously exacted from them in consideration of the plaintiff's forbearing to collect that note. It also set up the payment of such sums for his forbearance to collect such debt, that they aggregated the sum of about two thousand dollars, and demanded judgment against the plaintiff upon the counterclaim for that amount with interest.

The plaintiff, by his reply, denied the allegations of the answer, and expressly denied that the note in suit was a part of the three-thousand-dollar note mentioned therein, and upon which the defendants alleged that the usurious interest was taken.

The action was brought in the City Court of the city of New York, and upon the trial there was a direct conflict in the evidence as to whether the one-thousand-dollar note upon which the action was brought was given for a part of the note for three thousand dollars, upon which it was claimed that the plaintiff took a greater sum than six per cent interest. Upon that question the jury found for the defendants, to the effect that it was given in renewal of a part of the three-thousand-dollar note, and rendered a verdict in their favor for one thousand dollars. It having found that the amount they were entitled to recover for usurious interest paid by them was two thousand dollars, it deducted from that amount the amount of the note upon which the action was based, and rendered a verdict for the remainder.

After the verdict, the plaintiff moved to set it aside and for a new trial upon the exceptions and upon the grounds that it was contrary to law, contrary to the evidence, and for all the reasons mentioned in section 999 of the Code of Civil Procedure. That motion was denied, and a judgment against the plaintiff was entered.

The plaintiff thereupon appealed to the General Term of the City Court from the judgment so entered, and also from the order denying his motion to set aside the verdict and for a new trial. That court affirmed the judgment and order.

The plaintiff appealed from the decision of the General Term of that court to the Appellate Term of the Supreme Court, where the judgment of the General Term of the City Court was affirmed. The plaintiff thereupon made application for leave to appeal to the Appellate Division in the first department, which was granted.

In pursuance of such leave the plaintiff appealed to the Appellate Division, where the judgment was reversed and a new trial was granted, with costs to abide the event. The order of reversal contained no provision affirming as to the facts or dismissing the appeal from the order denying the plaintiff's motion for a new trial, but merely reversed the judgment and order of the courts below and granted a new trial

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without in any way showing that it was not reversed upon the facts. The plaintiff subsequently made a motion in the Appellate Division for leave to appeal to the Court of Appeals, which was granted.

*H. K. Coddington and George C. De Lacy* for appellants.

*Charles W. Dayton* for respondent.

MARTIN, J. The question whether the verdict was contrary to the evidence was distinctly raised upon the respondent's motion for a new trial made before the trial court. An appeal was taken from the order denying that motion as well as from the judgment, and the determination of the court in denying the motion for a new trial was involved in the appeal to the Appellate Division, where the facts were reviewable in the same manner as upon an appeal from a similar judgment or order of the Supreme Court. (Code Civil Procedure, §§ 1340, 3191.) If we should now reverse the determination of the Appellate Division and affirm the judgment of the trial court, the plaintiff would have a judgment against him entered upon a verdict and affirmed by this court, without having the question whether the verdict was contrary to evidence considered, and without having the benefit of a new trial, which may have been granted by the court below upon the sole ground that the verdict was not sustained by, or was contrary to the weight of, the evidence. It is well settled by the decisions of this court that an order of the Appellate Division granting a new trial in an action tried before a jury, where there is a conflict in the evidence and the order may have been based upon the insufficiency of the evidence, is not reviewable by this court unless it appears from the record that the order denying a new trial was affirmed as to the facts or the appeal therefrom dismissed. (*Wright v. Hunter*, 46 N. Y. 409; *Harris v. Burdett*, 73 N. Y. 136; *Snebley v. Conner*, 78 N. Y. 218; *Kennicutt v. Parmalee*, 109 N. Y. 650; *Voisin v. Commercial Mut. Ins. Co.*, 123 N. Y. 120, 131; *Peil v. Reinhart*, 127 N. Y. 381, 385; *Williams v. D., L.*

& *W. R. R. Co.*, 127 N. Y. 643; *Chapman v. Comstock*, 134 N. Y. 509, 512; *Mickes v. W. M. & R. M. Co.*, 144 N. Y. 613; *Hoes v. Edison General Electric Co.*, 150 N. Y. 87.)

In view of the principle so firmly established by the authorities cited, it becomes obvious that this appeal must be dismissed unless the fact that an order was granted allowing it, changes or adds to the authority of this court or affects the manner of determining the questions involved. If the defendants had possessed the right to appeal as of course, the appeal would be dismissed. Does such an order in any way change the authority of this court or the principles to be applied by it in disposing of appeals when thus allowed? We think not. We are of the opinion that the allowance of this appeal merely placed the appellants in the same position they would have occupied if they had possessed that right without any such order, and that the question must be disposed of in the same manner. In *Commercial Bank v. Sherwood* (162 N. Y. 310, 317), where there was an allowance of an appeal under subdivision 2 of section 191 of the Code of Civil Procedure, this court said: "The permission to appeal, under subdivision 2 of section 191, in no way enlarged the jurisdiction of this court with respect to the questions that may be reviewed by it upon a hearing of the appeal," citing *Reed v. McCord* (160 N. Y. 330); *Young v. Fox* (155 N. Y. 615); *Grannan v. Westchester Racing Assn.* (153 N. Y. 449); *Mundt v. Glokner* (160 N. Y. 571). We think that the allowance of an appeal by the Appellate Division does not require this court to adopt any different rule in determining the questions which are thus brought before it from that enforced in ordinary cases where no such allowance is necessary.

The appeal should be dismissed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN and LANDON, JJ., concur.

Appeal dismissed.

TERRENCE F. FERGUSON, Appellant, v. JULIUS F. BRUCKMAN,  
Respondent, Impleaded with Others.

1. **APPEAL — THE APPELLATE DIVISION HAS NO AUTHORITY TO REVERSE BY MODIFYING A PORTION OF AN ORDER NOT APPEALED FROM.** Where it appears upon the face of an order of the Appellate Division that upon an appeal from an order of the Special Term it reversed a portion thereof ordering a new trial, which was not appealed from, by modifying it and directing that the trial be continued before a different referee than that named in the Special Term order, the appellant has the right to insist in the Court of Appeals upon an appeal thereto from an affirmance by the Appellate Division of the judgment obtained against him upon the trial had in pursuance of such order, that the order was in excess of the authority of the Appellate Division, and, hence, that the proceedings based thereon were illegal.

2. **ALL GROUNDS RELIED UPON FOR DISMISSAL MUST BE SPECIFIED ON FIRST MOTION THEREFOR.** Where a motion has been made for the dismissal of an appeal to the Court of Appeals, a subsequent motion, based upon grounds which were not brought to the attention of the court upon the first motion, must be denied; since a party may not make as many separate motions to dismiss an appeal as he has, or supposes he has, distinct grounds therefor, but must instead assign on his first motion all the reasons that he relies upon for a dismissal.

*Ferguson v. Bruckman*, 18 App. Div. 358; 26 App. Div. 628, reversed.

(Argued October 9, 1900; decided November 20, 1900.)

**APPEAL** from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 1, 1898, modifying and affirming, as modified, a judgment in favor of defendant, entered upon the report of a referee, and also an appeal from an order of said Appellate Division, entered July 7, 1897, modifying an order of Special Term which vacated a judgment and directed a new trial before another referee, and directing that the report of the referee and the judgment entered thereon be set aside and the trial continued before the former referee.

A motion to dismiss the appeals herein upon the grounds that the judgment was interlocutory, and, therefore, not appealable, and that the right to appeal from the order had been waived by going back to the new or continued trial

ordered, was made in this court October 7, 1898, and denied October 25, 1898. (See 157 N. Y. 688.) The motion to dismiss the appeal from the order was renewed upon the argument, upon the ground that the plaintiff had accepted a benefit under the order, and, therefore, could not appeal therefrom.

This was an action between partners, both of whom demanded judgment settling their rights and directing a distribution of the assets of the partnership.

The facts, so far as material, are stated in the opinion.

*George S. Billings* for appellant. Where reference has been made to hear and determine an action, and a trial has been had and a decision made determining all the rights of the parties, and final judgment has been entered thereon, the court has no power in setting aside the judgment on the ground of newly-discovered evidence or any similar ground to direct a continuance of the trial already had and ended. No such remedy is given by law. The only remedy is a new trial. (*Heath v. N. Y. B. L. B. Co.*, 84 Hun, 302; 146 N. Y. 260; *Rockwell v. Carpenter*, 25 Hun, 529; *McLean v. Stewart*, 14 Hun, 472; *Oakley v. Cokalets*, 6 App. Div. 229; *Gilfoyle v. Pierce*, 9 App. Div. 1; *Kamp v. Kamp*, 59 N. Y. 215; *Bohlen v. M. E. R. R. Co.*, 121 N. Y. 546; *Ferguson v. Bruckman*, 16 App. Div. 67.)

*Sidney V. Lowell* for respondent. The order opening and continuing the trial was a proper one. (*Maicas v. Leony*, 113 N. Y. 619; *Roberts v. White*, 73 N. Y. 375.)

PARKER, Ch. J. The appellant contends that the judgment before the court is not grounded upon a lawful trial and that, therefore, his rights are being unlawfully invaded by it. That his contention is well founded will readily appear from a brief statement of the procedure leading up to the judgment. By the consent of both parties the court at Special Term made the following order: "It is ordered, that it be and it is hereby referred to Sanders Shanks, Esq., to hear and determine this



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action and all the issues therein." The case was tried before the referee and about three months later he made his decision, wherein he decided all of the issues in the action and upon which a final judgment was rendered, from which no appeal was taken. About a month after such entry of judgment the defendant, claiming that through misunderstanding and inadvertence he had neglected to prove that there were other assets that had been realized by the plaintiff, which had they been proved would have entitled him to judgment against the plaintiff in still greater amount, obtained an order referring such matters to the same referee with directions that he proceed to take the proofs of the parties as to the said collections and receipts and take and state an account. An appeal was thereupon taken by the plaintiff to the Appellate Division, where the order was reversed, without costs, but "with leave to the defendant to apply at Special Term to vacate the judgment," the court appreciating that while that final judgment stood in full force and effect, determining as it did all the issues between the parties, there was no foundation for a further reference in the matter. A few weeks later the court at Special Term made an order vacating the judgment and granting a new trial before Almet F. Jenks, Esq., "to whom it is referred to hear and determine the action and all the issues therein, and to take and state the accounts of the parties. This order is made upon the following terms and conditions, to wit: "That the defendant pay to the plaintiff within ten days from the date of this order, or, if an appeal from this order be taken within that period, then within ten days after the determination of such appeal, the sum of \$459.35, paid by the plaintiff pursuant to such judgment; also the sum of \$119.90, expended by the plaintiff for stenographer's fees on the former trial; also the plaintiff's costs of the action for all proceedings to date; and that the defendant stipulate that no costs be awarded him herein, except for proceedings to be hereafter had." An appeal being taken to the Appellate Division from a portion of the order only, that court, without authority, as will appear from

an examination of the notice of appeal and the order made thereon, modified the order by reversing a portion of it not appealed from and directed that the trial of the action be continued before Sanders Shanks, Esq., who was the referee upon whose decision the first judgment was rendered.

The notice of appeal states that the defendant appeals "from each and every part of said order, except that part of the order vacating the judgment herein, dated December 7th, 1896, and *ordering a new trial*. It being the intention to appeal from each and every provision in said order except the provision *vacating the judgment* and *ordering that a new trial should be had*, but the details as to how and before whom the trial should be had, and the terms and conditions imposed and all other matters contained in said order are appealed from." Thus, the appellant advised the court by this notice, *first*, that the appeal was not taken from that portion of the order ordering a new trial, and, *second*, that it was not his intention to appeal from that provision of the order directing that a new trial should be had; and it follows that the court upon review did not obtain, by virtue of this notice of appeal, any authority whatever to reverse or modify that portion of the order of the Special Term ordering a new trial. But the court assumed that it had such authority, and it attempted its exercise by such a modification of the order as reversed and set aside that part of it which ordered a new trial. So much of the order as is in point reads: "Ordered, that the motion of the defendant Julius F. Bruckman be granted; that the report of the referee and the judgment entered thereon in this action be vacated and set aside, and *that the trial of the action be continued before Sanders Shanks, Esq.*, the referee hitherto appointed herein, the testimony already taken to stand and either party to be at liberty to offer such additional evidence as he may elect."

It appearing on the face of the Appellate Division order that it reversed a portion of the Special Term order not appealed from, the appellant has the right to insist, upon this, his first opportunity to challenge in this court its validity, that

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it was in excess of the authority of the court, and, hence, that the proceedings based thereon are illegal.

The motion to dismiss the appeal is denied for the reason that the grounds upon which the motion is made should have been brought to the attention of the court when the motion was first made. A party may not make as many separate motions to dismiss an appeal as he has, or supposes he has, distinct grounds for such motion, but must, instead, assign on his first motion all the reasons that he relies upon for a dismissal.

The judgment and the order of the Appellate Division of July 6th, 1897, should be reversed, and that of the Special Term affirmed, with costs.

BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ., concur; O'BRIEN, J., not voting.

Judgment and order accordingly.

In the Matter of the Accounting of THOMAS STURGIS, as Surviving Trustee of CATHARINE STURGIS, Deceased.

EBEN B. CROCKER et al., Selectmen of the Town of Barnstable, Massachusetts, Appellants; JAMES McKEEN et al., as Executors of ESTHER FRANCES STURGIS, Deceased, Respondents.

WILL — TRUST FOR POOR PERSONS OF PARISH — COMPETENCY OF TRUSTEES. A bequest in trust "to the Selectmen, or other municipal authorities of the East Parish of my native town Barnstable, in the county of Barnstable and State of Massachusetts, or their successors forever, by what name soever such municipal authorities may at any time be known," to appropriate the income for the relief of persons of such parish in reduced circumstances, which trust, under the laws of Massachusetts, is valid so far as its purpose and beneficiaries are concerned, does not fail for want of competent trustees, notwithstanding that by the law of Massachusetts the town or its municipal authorities as such would not be competent trustees, since there is no appointment of the officers in their official capacity to the position of trustees, nor any gift to the town, but the trustees appointed are private citizens and are to act as such.

*Matter of Sturgis*, 48 App. Div. 624, reversed.

(Argued October 1, 1900; decided November 20, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, made February 11, 1900, affirming a decree of the New York County Surrogate's Court construing the will of Catharine Sturgis, deceased, and judicially settling the account of Thomas Sturgis as surviving trustee thereunder.

The facts, so far as material, are stated in the opinion.

*Edwin Countryman* and *Everett Masten* for appellants. The testatrix, by the 8th article of her will, appointed individual trustees, not by name, but by an adequate description, and did not intend to appoint either a municipal corporation or any officers thereof in their official characters, or the officers of a supposed municipality that did not exist. (*Wells v. Heath*, 10 Gray, 17; *Webb v. Neal*, 5 Allen, 575; *Dunbar v. Soule*, 129 Mass. 284; *Inglis v. S. S. Harbor*, 3 Pet. 99; *Kurzman v. Lowry*, 23 Misc. Rep. 380.) The testatrix having made her bequest to individual trustees, about whose competency no question can be raised, the bequest must be sustained and the deposit surrendered to these appellants, who are the trustees described. (*Dammert v. Osborn*, 140 N. Y. 30; *Hollis v. D. T. Sem.*, 95 N. Y. 166; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Manice v. Manice*, 43 N. Y. 303; *Gilman v. McArdle*, 99 N. Y. 451; *Going v. Emery*, 16 Pick. 107; *Jackson v. Phillips*, 14 Allen, 539; *Saltonstall v. Sanders*, 11 Allen, 446; *Sears v. Chapman*, 158 Mass. 400; *Ostrom v. Greene*, 161 N. Y. 353.)

*James McKeen* for respondents. The forms and requisites necessary to constitute a valid testamentary instrument under our law have not been complied with. (*Hope v. Brewer*, 136 N. Y. 126; *Holland v. Alcock*, 108 N. Y. 337; *Bascom v. Albertson*, 34 N. Y. 587; *Williams v. Williams*, 8 N. Y. 525; *Owens v. M. Society*, 14 N. Y. 380.)

BARTLETT, J. This appeal involves the validity of the eighth clause of the will of Catharine Sturgis, deceased.

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By the seventh clause of her will she gave to her sister, Esther Frances Sturgis, the income on the sum of six thousand dollars during the term of her natural life.

By the eighth clause she gave and bequeathed "to the Select Men, or other municipal authorities of the East Parish of my native town Barnstable, in the county of Barnstable and State of Massachusetts, or their successors forever by what name soever such municipal authorities may at any time be known, the said sum of six thousand dollars after the death of my said sister, Esther Frances, in trust nevertheless that the said Select Men, or other municipal authorities, shall keep the same on deposit with the said Massachusetts Hospital Insurance Company, and shall appropriate the annual interest, income or profits thereof in sums of not less than ten or more than fifty dollars to any one person in any one year, in the discretion of said Select Men or other municipal authorities, so as to do the most possible good for the relief and benefit of respectable persons in reduced circumstances of either sex in the said East Parish of the said town of Barnstable, but not including any person or persons wholly dependent upon the said town or parish for their support; and such appropriation and distribution to be so made to such respectable poor persons without distinction of age, relation or color, but to be only made to such persons as are native-born citizens of the United States or the descendants of such native-born citizens."

The testatrix died in 1881 and her sister, Esther Frances, received the income of this fund until her death in 1896.

The Surrogate's Court found as a fact "that by the law of Massachusetts the trust so attempted to be created would there be a valid trust, and the court there would have the power to appoint a trustee on its appearing that the testatrix had failed to designate such a trustee competent to act."

It further found "that there was in the will of said testatrix no trustee designated competent to take and administer the trust attempted to be created by the eighth paragraph of her will."

As a conclusion of law the court found that the bequest in

the eighth paragraph of said will is void, and that the property thereby attempted to be disposed of passed to the residuary legatee.

The Appellate Division affirmed with a divided court on the opinion of the surrogate.

We thus have the single question presented whether this testatrix succeeded in naming trustees competent to carry out the provisions of a trust concededly valid under the laws of Massachusetts.

It is further found by the Surrogate's Court that the town of Barnstable was incorporated in 1639; that in 1717 the town was divided into two parishes, to wit, the east and west parishes; that distinct municipal officers have never been chosen for either parish; that the selectmen, who were also assessors and overseers of the poor, are chosen for the whole town, and as such, exercise the duties of said offices throughout the several villages making up the town; that the parish lines are recognized by the assessors in the assessment of taxes; that by the law of Massachusetts towns were not entitled to take by bequest money in trust, the income to be applied for the benefit of a portion of the inhabitants of a territorial subdivision of the town for the purposes and limitations set forth in the will of said testatrix.

It seems to us that there is no difficulty in dealing with the phraseology of the eighth clause of the will which describes the selectmen or other municipal authorities as of the east parish of the town of Barnstable. The fact that the town is divided into two parishes and the selectmen and municipal authorities are chosen for the entire town of Barnstable, but discharge their duties in both parishes, is sufficient to satisfy the language of the will.

As we read this will, the act of the testatrix in selecting trustees was most natural and effectual under the circumstances. The testatrix found herself in this situation: the fund she proposed to have invested, devoting the income to charity, was first to be enjoyed by her sister for life.

This life estate might cover a very considerable period of

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time, which proved to be the case, and the trust for charitable uses was to remain in force indefinitely, as was permitted by the law of Massachusetts.

In this emergency what was more natural than for the testatrix to appoint individual trustees ; but, by official description, that was quite definite. In this manner she selected trustees and a line of successors apparently unbroken for an indefinite period, corresponding with the duration of the trust.

There was no appointment of these officers in their official capacity to the position of trustees, nor was the bequest in any legal sense a gift to the town of Barnstable.

The trustees appointed are private citizens and are to act as such, but by reason of their official position are likely to have a knowledge of local affairs that will aid them in the discharge of their duties.

In this state, where the suspension of the power to alienate real estate and the absolute ownership of personal property is measured by lives in being, testators are not often called upon to act under the circumstances presented in the case before us. A very instructive case in the Supreme Court of the United States bearing on the right of a testator to select individual trustees by their official titles originated in this state (*Inglis v. The Trustees of the Sailors' Snug Harbor*, 3 Peters, 99).

In this case, in 1830, certain provisions of the will of Robert Richard Randall were under review. He gave and devised the residue of his estate, which consisted of a large amount of real and personal property, to the chancellor of the state of New York, the mayor and recorder of the city of New York (and several other persons by their official descriptions only) and their successors forever, in trust, to erect and build on the lands devised, out of the rents and profits, an asylum or marine hospital, to be called "The Sailors' Snug Harbour," for the purpose of supporting aged, decrepid and worn-out sailors, etc.

The will further provided that if his intention, as above expressed, could not legally be carried out without an act of

the legislature, he directed his trustees to secure it and to incorporate under it for the purposes he had specified.

A few years after testator's death this legislation was secured, and the corporation of "The trustees of the Sailors' Snug Harbour in the City of New York" has ever since been managed by a board of trustees acting individually, although described by their official titles only, consisting of the mayor, the recorder, the rector of Trinity Church, the president of the Chamber of Commerce, and one or two others.

Mr. Justice THOMPSON said, in the course of his opinion: "In the case now before the court there is no uncertainty with respect to the individuals who were to execute the trust. The designation of the trustees, by their official character, is equivalent to naming them by their proper names. Each office referred to was filled by a single individual, and the naming of them by their official distinction was a mere *designatio personarum*. They are appointed executors by the same description, and no objection could lie to their qualifying and acting as such. The trust was not to be executed by them in their official character, but in their private and individual capacities."

The court in an elaborate opinion sustained the devise, holding it divested the heir of his legal estate, or charged it in his hands with the trust declared in the will.

We are of opinion that Catharine Sturgis, the testatrix, designated competent trustees to administer the trust created by the eighth subdivision of her will, and as that trust is valid under the laws of Massachusetts, the fund involved and its accumulations, if any, should be paid over to the said trustees.

The order of the Appellate Division and the surrogate's decree should be reversed, with costs in all the courts, and the case remitted to the Surrogate's Court with direction to modify the decree so as to direct the surviving executor to surrender the fund to the appellants, as trustees under the eighth subdivision of the will of Catharine Sturgis, deceased.

PARKER, Ch. J., O'BRIEN, MARTIN, VANN and LANDON, JJ., concur; HAIGHT, J., not voting.

Order reversed, etc.



JACOB SMITH, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

NEGLIGENCE — LIABILITY OF MASTER FOR INJURY RESULTING TO SERVANT FROM LATENT DEFECT IN APPLIANCE. A master is not liable to a servant for an injury to the latter in consequence of a latent defect in an appliance, where the evidence shows that the material furnished by the master for the manufacture of the appliance, and out of which it was made, was proper; that there was nothing in its appearance to indicate inefficiency, and that it was made by competent and skilled workmen and was subjected to frequent and thorough inspections of such a character as to reveal any flaw or defect that could be discovered in that way.

*Smith v. N. Y. C. & H. R. R. R. Co.*, 33 App. Div. 628, reversed.

(Argued October 8, 1900; decided November 20, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered August 2, 1898, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Charles A. Pooley* for appellant. Exceptions to the rulings of the court on objections to the admission of evidence were taken which call for a reversal. (*Strohm v. N. Y., L. E. & W. R. R. Co.*, 96 N. Y. 305; *Tozer v. N. Y. C. & H. R. R. Co.*, 105 N. Y. 617; *Jewell v. N. Y. C. & H. R. R. Co.*, 27 App. Div. 500; *Kleiner v. T. A. R. R. Co.*, 162 N. Y. 193.) No negligence was shown on the part of the defendant. (*Stringham v. Hilton*, 111 N. Y. 188; *De Graff v. N. Y. C. & H. R. R. R. Co.*, 76 N. Y. 125.) The servant seeking to recover for an injury takes the burden upon himself of establishing negligence on the part of the master and due care on his own part. (Wood on Mast. & Serv. § 382; *De Graff v. N. Y. C. & H. R. R. R. Co.*, 76 N. Y. 77; *France v. R., W. & O. R. R. Co.*, 88 Hun, 318; *Crown v. Orr*, 140 N. Y. 450; *Wright v. N. Y. C. & H. R. R. R. Co.*,

25 N. Y. 566.) The employer is bound to exercise due care and diligence in furnishing for the use of his employees fit and safe implements and machinery; he is not held to be a guarantor of their safety, and the onus is upon the plaintiff to show some negligence on the part of the employer in respect to the performance of the duty resting upon him. (*Painton v. N. C. R. Co.*, 83 N. Y. 7; *Cahill v. Hilton*, 106 N. Y. 518; *Cosulich v. S. O. Co.*, 123 N. Y. 118; *Devlin v. Smith*, 89 N. Y. 476; *Fuller v. Jewett*, 80 N. Y. 53; *Warner v. E. R. R. Co.*, 39 N. Y. 471; *Probst v. Delamater*, 100 N. Y. 373; *Leonard v. Collins*, 70 N. Y. 90; *Kern v. D. R. Co.*, 125 N. Y. 50; *Oregan v. Marston*, 126 N. Y. 568.)

*Morris Cohn, Jr.*, for respondent. The plaintiff did not assume the risk of the defective ring. (*Ford v. L. S. & M. S. R. Co.*, 124 N. Y. 498.) It was the master's duty to use reasonable care to furnish to his servant a reasonably safe and suitable ring for the purpose for which such ring was to be used, and this duty could not be delegated by the master to any fellow-servant. (*Painton v. N. C. R. Co.*, 83 N. Y. 7; *Bryer v. Foerster*, 9 App. Div. 542; *Rettig v. F. A. Co.*, 6 Misc. Rep. 328; *Solarz v. M. Ry. Co.*, 8 Misc. Rep. 656; *Fuller v. Jewett*, 80 N. Y. 46; *Probst v. Delamater*, 100 N. Y. 266; *Ellis v. N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 552; *Scherer v. H. Mfg. Co.*, 86 Hun, 37; *Green v. Banta*, 16 J. & S. 156; *Benzing v. Steinway*, 101 N. Y. 550.) The duty of inspection rested upon the defendant, and it was for the jury to say whether the inspection made was sufficient and proper. (Bailey on Mast. & Serv. 93; S. & R. on Neg. §§ 194-196; *De Graff v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 125; *Cutridge v. M. P. R. Co.*, 105 Mo. 520; *Bailey v. R., W. & O. R. R. Co.*, 139 N. Y. 302; *Sneider v. Treichler*, 56 Hun, 309; *Morton v. R. R. Co.*, 81 Mich. 483; *Ballard v. Hitchcock*, 71 Hun, 582; *Bucher v. Prybil*, 19 App. Div. 126; *Spicer v. S. B. I. Co.*, 138 Mass. 426; *U. P. Ry. Co. v. Daniels*, 152 U. S. 684; *Eaton v. N. Y. C. & H. R. R. Co.*, 163 N. Y. 391.) The exceptions

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referred to by appellant do not justify the reversal of the judgment and the granting of a new trial. (*Tomaselli v. G. C. Co.*, 9 App. Div. 127.)

O'BRIEN, J. The plaintiff recovered a verdict in this action of \$10,800 for injuries, consisting of a broken ankle and various bruises, while engaged in the defendant's service as a blacksmith. The broken ankle is a permanent disability. The others were temporary, and though painful for a time have been substantially healed. The accident resulting in the injury occurred on the 28th day of July, 1895. It was caused by the breaking of a ring in a chain which was one of the appliances used in the job upon which the plaintiff was then engaged. There is no substantial dispute as to the cause of the accident, or as to the manner in which it occurred. Both sides state the facts in the same way and substantially as follows: At Spuyten Duyvil the defendant has a drawbridge over the creek. When vessels are passing the bridge is hauled up from a horizontal to a perpendicular position, and stands against the towers which contain the appliances for opening it. These towers are about 75 feet high, and are provided with several weights, equal in all to the weight of the bridge; and an engine about half way up, which regulates the raising and lowering of the bridge. These weights are attached to a heavy wire cable extending from the weights to the further end of the bridge, so that as the bridge raises the weights lower. The wire cable passes through all the weights and is made fast to the bottom one by splaying out the strands of wire on the under side of the weight and then pouring in babbit metal to fill the hole and hold the metal.

The wire cable had become worn by use, and it was determined to replace it with a new one. In order to remove the old cable the bridge gang had securely blocked up the weights at the top of the tower, and had cut off the cable, leaving the stub end in the lowest weight, and had then rigged a chain about the timber at the top of the tower and a pulley block and fall attached to the weight, and lowered the weight to

the ground. This was done one evening, and after melting out the babbit metal the weight was brought again to the tower, and the same rigging which had been used to lower it, and which had remained where it was over night, was again attached to the weight and they proceeded to hoist the weight back to its place. The foreman stood at the hoisting engine standing on the ground near the foot of the tower, and as the weight began to lift it became caught under a timber of the tower, so that it had to be dislodged. The foreman called plaintiff to dislodge it and guide the weight from under the timber, and then told him to get upon it and ride it up so as to keep it clear from other projecting timbers of the tower. The plaintiff mounted it and rode up about 30 feet, when the plaintiff says the weight must have caught on a beam, and the ring of the chain at the top of the tower broke, precipitating the plaintiff and the weight to the ground, resulting in the injury complained of. The weight was three feet long, twenty inches wide and sixteen inches thick, and in raising it it was so fastened to the fall that the plaintiff could stand upon the flat surface.

The gang of men that the plaintiff worked with was called the bridge gang, and they had been furnished with every appliance necessary for the performance of the work. The plaintiff was attached to this gang as the blacksmith, in which capacity he had been in defendant's service for five years prior to the accident. The ring in question had been in use about two years. It was made of the best material by competent and skilled workmen, and had been inspected by competent men several times during the period it was in use, when proper tests were applied to discover any flaw or defect in the iron, and had been examined before use on this occasion. It broke because subjected to an unusual strain, due to the circumstance that the weight was caught under the timbers of the tower.

The court charged the jury that it appeared without dispute in the evidence that the material furnished by the master for the manufacture of the ring, and out of which it was made,

was proper material; that there was nothing in its appearance to indicate inefficiency, and that it was made by competent and skilled workmen. There was some proof given by the plaintiff tending to show a concealed defect in the iron of the ring at the place where it broke, due to the presence of dirt or sulphur, or both within the body of the metal. The weld of the ring made by the workman did not part, but the metal broke in such a manner as to leave part of the weld on either end of the break.

The only question submitted to the jury, as I understand the charge, was whether this concealed defect, if it existed, could have been discovered by the workman who made the ring, in the exercise of ordinary care, and possibly the other question, whether there was proper inspection of the chain and ring while in use. The defendant's counsel at the close of the plaintiff's case moved for a nonsuit on various grounds, and among others that there was no proof of negligence on the part of the defendant to which the accident could be attributed. The same motion was renewed at the close of the whole case, and in both instances denied and an exception taken.

It seems to have been assumed by the court and by counsel on both sides that if there was any defect in the iron at all it was a concealed defect and the proof to that effect was undisputed. There is no dispute in the evidence that the inspection was made by competent men in the defendant's employ and that the inspection was frequent and thorough and of such a character as to reveal any flaw or defect in the iron that could be discovered in that way. There is no basis in the proof for imputing negligence to the defendant for omission to cause the chain to be inspected in a reasonable and proper manner, and the court having instructed the jury, as we have seen, that there was nothing in the appearance of the iron from which the ring was made to indicate any defect and that the workman employed to make it was competent and skillful, it is difficult to see how the jury could have found that the defendant was negligent in not discovering the defect

if it existed. The facts which the learned judge in his charge assumed as established by the undisputed proof really acquitted the defendant of the charge of negligence. (*De Graff v. N. Y. C. & H. R. R. R. Co.*, 76 N. Y. 125; *Burke v. Witherbee*, 98 N. Y. 562; *Cahill v. Hilton*, 106 N. Y. 512; *Flood v. W. U. Telegraph Co.*, 131 N. Y. 603; *Probst v. Delemater*, 100 N. Y. 266; *Hart v. Naunburg*, 123 N. Y. 641; *Kern v. De Castro & D. S. Refining Co.*, 125 N. Y. 50; *Oregan v. Marston*, 126 N. Y. 568; *Carlson v. P. B. Co.*, 132 N. Y. 273; *Harley v. Buffalo Car Mfg. Co.*, 142 N. Y. 31.)

But if this was a much stronger case on the merits than it evidently is, we would be obliged to reverse the judgment upon exceptions to rulings at the trial.

(1) The court admitted proof by the plaintiff, under defendant's exception, to show that the person in charge of the engine on the day of the accident and another person who had charge of the engine generally, but was absent on the day of the accident, were not licensed engineers under chapter 643 of the Laws of 1886, § 311. That statute does not make the license proof of the engineer's competency in an action of negligence against the master, nor does the absence of a license in such a case show that he was incompetent. Common-law proof may be given of that fact when in issue. Both of these persons had been in the service of the defendant many years in the same capacity, and there was no proof tending to show that either was not in fact a competent engineer. Moreover, it was not alleged or claimed that the accident was in any degree to be attributed to the conduct of the engineer, but solely to the breaking of the ring. In fact, the court refused to submit any such question to the jury. The testimony, however, remained in the case, and was calculated to mislead the jury in considering the two questions that were submitted. They might very well conclude that they were at liberty to pass upon any question in the case within the range of the testimony.

(2) The plaintiff's counsel propounded to a physician called

to describe the extent of the injury the following question: "State the comparative use that he would have of his present foot and an artificial foot?" The question was objected to as incompetent, but the objection was overruled and an exception taken. The witness answered that the plaintiff could get around better and be more useful with an artificial foot. The question of damages was of course submitted to the jury, and this ruling, instead of confining them to the injury as it was, permitted them to speculate upon the plaintiff's condition after the foot was amputated and replaced by an artificial one. The testimony was prejudicial to the defendant, since it had a tendency to confuse and mislead the jury. As it remained in the case without any explanation by the court they might very well have assumed that they were at liberty to award as part of the damages compensation to the plaintiff for the pain and danger of amputation, as well as the expense of supplying himself in the future with the artificial foot, a consequence which it was not claimed would follow as the natural or necessary result of the injury.

(3) There were several other exceptions in the record to the admission of proof concerning the conduct and statements of the plaintiff's co-servants engaged with him in raising the bridge at the time of the accident. The court in the charge eliminated from the case all questions of negligence on the part of the defendant arising from the selection, employment or retention of these co-servants, and no such question was submitted to the jury, but the testimony referred to remained in the case without note or comment, and it is quite impossible to say how far it influenced the jury as to the result, if at all, and since they may all be obviated upon another trial it is not needful to consider them. The judgment entered upon the verdict was affirmed by a divided court, and, hence, the sufficiency of the proof to establish the cause of action is open to review in this court, or, more properly, the question whether there is any evidence at all tending to sustain the allegation of negligence. The plaintiff no doubt sustained a

very severe injury which might well appeal to the justice and sympathy of the master, but unless the record is materially changed upon another trial there is no basis for a legal liability on the part of the defendant, since it is not chargeable with negligence upon the proof now before us.

The judgment should be reversed and a new trial granted, costs to abide the event.

LONDON, J., concurs; PARKER, Ch. J., HAIGHT, MARTIN and VANN, JJ., concur on the ground that there was not sufficient evidence to go to the jury; BARTLETT, J., concurs in result.

Judgment reversed, etc.

JOHN W. CLARK, Respondent, v. THE NATIONAL SHOE AND LEATHER BANK OF THE CITY OF NEW YORK, Appellant.

1. APPEAL — REVIEW OF FINDING OF FACT — UNANIMOUS AFFIRMANCE BY APPELLATE DIVISION. The unanimous affirmance by the Appellate Division of a judgment against a bank in favor of a depositor for a balance on his account without deducting the amount by which checks were raised by his bookkeeper, withdraws from the review of the Court of Appeals the evidence upon which the trial court based its finding that the plaintiff was not negligent in the examination of his accounts; and, if there is no finding of fact inconsistent with the finding as to negligence, the court cannot review that finding, notwithstanding the defendant's contention that a proved and uncontradicted fact which, however, the court did not find, conclusively established the plaintiff's negligence, no exception to the omission to find that fact having been taken.

2. CONSTRUCTION OF FINDING. A finding by the trial court in an action by a depositor against a bank for a balance due without deducting the amount by which checks were raised by his bookkeeper, that on a specified date the "plaintiff discovered the said forgeries and notified the defendant thereof with due diligence," taken in connection with the further finding that the plaintiff "was in no way negligent" in his examination of the accounts stated by the bank, imports that the plaintiff objected within a reasonable time to the accounts stated by the bank.

3. EVIDENCE — BOOK ENTRIES NOT MADE BY WITNESS. Upon the question as to the amount for which checks, subsequently raised, were originally drawn, in an action between the depositor and the bank, entries made in his cash book by his bookkeeper, who is not a witness, are admissible where it appears from the plaintiff's testimony that in the course of

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his business the entries were made from memoranda to which he could testify from memory, and that they correctly stated the amounts for which the checks were drawn, the entries being compared by him with the memoranda after the checks were drawn, and in each case found to be correct, the memoranda being then destroyed.

*Clark v. Nat. Shoe & Leather Bank*, 82 App. Div. 816, affirmed.

(Argued October 8, 1900; decided November 20, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered July 16, 1898, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

The action was brought to recover the sum of \$1,950, the complaint alleging that sum to be due the plaintiff upon his deposits in the defendant's bank.

The facts, so far as material, are stated in the opinion.

*James L. Bishop* for appellant. The several accounts stated became conclusive upon the failure of the plaintiff upon examination of the accounts to object to the same, irrespective of whether he was or was not guilty of negligence in making the examination. (*Myers v. S. W. Nat. Bank*, 193 Penn. St. 1; *Birmingham Bank v. Allen*, 100 Ala. 482; *Weinstein v. Bank*, 69 Tex. 38; *Hardy v. Chesapeake Bank*, 51 Md. 562; *Dana v. Nat. Bank*, 132 Mass. 156; *L. M. Nat. Bank v. Morgan*, 117 U. S. 96.) The court erred in permitting the plaintiff to give evidence as to the contents of his own books of account kept by the forger. (*Feeter v. Heath*, 11 Wend. 479; *Lawrence v. Barker*, 5 Wend. 301; *Marcy v. Shults*, 29 N. Y. 346; *Russell v. H. R. R. R. Co.*, 17 N. Y. 140; *Dwight v. Cutting*, 91 Hun, 38; *People v. McLaughlin*, 150 N. Y. 365, 392; *Waite v. High*, 96 Iowa, 742; *N. U. Bank v. Madden*, 114 N. Y. 280; *McCormack v. P. R. R. Co.*, 49 N. Y. 315, 316; *Peck v. Valentine*, 94 N. Y. 569.)

*O. B. Gould* for respondent. The objections to allowing the plaintiff to refresh his recollection were properly overruled.

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(*Biglow v. Hall*, 91 N. Y. 145; *Howard v. McDonough*, 77 N. Y. 592; *Wise v. P. F. I. Co.*, 101 N. Y. 637; *Nat. U. C. Bank v. Madden*, 114 N. Y. 280; *Wilson v. K. C. E. R. R. Co.*, 114 N. Y. 498; *People v. McLaughlin*, 150 N. Y. 392; *Halsey v. Sinsebaugh*, 15 N. Y. 485; *Russell v. H. R. R. R. Co.*, 17 N. Y. 139.) As between the bank and the maker of a properly drawn check, the bank becomes an insurer of the genuineness of the check which it pays — not the signature only, but the whole check. (*Weiser v. Denison*, 10 N. Y. 68; *Welsh v. G. A. Bank*, 73 N. Y. 424; *Frank v. Chemical Bank*, 84 N. Y. 209; *Crawford v. W. S. Bank*, 100 N. Y. 54; *Shipman v. Bank of S. N. Y.*, 126 N. Y. 327.) An account stated may always be opened for mistake or fraud. (*Shipman v. Bank of S. N. Y.*, 126 N. Y. 327; *Conville v. Shook*, 144 N. Y. 688; *Weiser v. Denison*, 10 N. Y. 68; *Welsh v. G. A. Bank*, 73 N. Y. 424; *Graves v. A. E. Bank*, 17 N. Y. 205; *Bergin v. Hitchings*, 22 App. Div. 395.) No negligence by plaintiff in examining the stated accounts and vouchers was pleaded or proved. (*Weiser v. Denison*, 10 N. Y. 68; *Welsh v. G. A. Bank*, 73 N. Y. 424; *Frank v. Chemical Bank*, 84 N. Y. 209; *Crawford v. W. S. Bank*, 100 N. Y. 54; *Shipman v. Bank of S. N. Y.*, 126 N. Y. 328; *L. M. Nat. Bank v. Morgan*, 117 U. S. 122.)

LANDON, J. To sustain his cause of action the plaintiff gave evidence tending to prove that twenty-one of the many checks which he drew against his deposits in the defendant's bank had been intrusted to his bookkeeper, one Lamothe, who by fraudulent alterations before presentation to the bank, raised them above the amounts for which they were drawn, and that the bank paid them to the bookkeeper at their increased amounts, and so charged them to the plaintiff; and that the aggregate of such fraudulently increased amounts was the sum of \$1,950. The account extended from February 11, 1895, until October 10, 1896. The plaintiff discovered the fraudulent alterations, or some of them, about July 27, 1896, and immediately notified the defendant. Prior to such notice

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the defendant had balanced the plaintiff's account according to its own books and entered the balance thus found in plaintiff's pass book, and returned the book to his bookkeeper, Lamothe, together with the paid checks and a slip showing the amounts charged to the plaintiff upon each check and the aggregate amount.

The plaintiff caused his pass book and returned checks and the bank slip of checks paid to be examined soon after their return from the bank by an expert, one Luff, who reported the account to him to be correct. The plaintiff's theory was that Lamothe so altered the checks, pass book and the footings of the bank slip after their return as to deceive the expert.

The defendant insists that the negligence of the plaintiff in the examination of the accounts stated precludes his recovery. The trial court found that he was not negligent. The unanimous affirmance by the Appellate Division withdraws from our review the evidence upon which this finding is based, and there is no other finding of fact inconsistent with the finding of negligence. We cannot review the finding. The defendant urges that a proved and uncontradicted fact which, however, the trial court did not find, conclusively established the plaintiff's negligence. No exception presents this omission or refusal, and we, therefore, cannot review it. (*National Harrow Co. v. Bement*, 163 N. Y. 506.)

The defendant urges that, apart from the question of the plaintiff's negligence, the failure of the plaintiff to object to the accounts stated by the bank within a reasonable time made such stated accounts conclusive.

The trial court found "That on or about the 27th day of July, 1896, the plaintiff discovered the said forgeries and notified the defendant thereof with due diligence." This is not a finding that the plaintiff did not object within a reasonable time. Taken in connection with the further finding that the plaintiff "was in no way negligent" in his examination of the account stated it imports that the plaintiff did object within a reasonable time. The question which the defendant seeks to present is not before us.

A question for review does arise upon the defendant's exceptions to the admission of evidence. It was important for the plaintiff to show the true amounts for which the altered checks had been drawn. Because of the alterations in the checks themselves this could not be determined by inspecting them. Lamothe, the bookkeeper, was not produced. The plaintiff testified that nineteen of the twenty-one checks were made as follows :

His bookkeeper, usually every Saturday, presented him with a statement upon a pad of the amount of the payroll furnished by the superintendent and an itemized statement of the office expenses. The plaintiff added these items, stating the total sum upon the pad, handed it to his bookkeeper, and directed him to draw a check for the whole amount. The bookkeeper then went into another room, entered the statement and its amount in the cash book, drew a check for the whole amount, presented the check to the plaintiff for signature, together with the statement upon the pad ; the plaintiff compared the amounts of each and finding them the same signed and indorsed the check, delivered it to his bookkeeper, retained the pad until the following Monday, when he compared it with the entries upon the cash book and always found them alike ; he then destroyed the pad. He produced the cash book ; the entries upon it showed no signs of alteration, and the plaintiff and others testified that they had not been altered. The plaintiff's examination was long, and the effort was made to have him testify from a refreshed memory after inspecting the entries. It is clear, however, that he stated the original amounts of the checks by reading into them the entries in the book, and that he could not state the amounts from a refreshed memory or otherwise than by adopting the entries in the cash book as true. The entries in the cash book were thus in effect read in evidence.

It is plain that if the entries in the cash book were proved to be true, they showed or at least tended to show in connection with the plaintiff's testimony the amounts for which the checks were originally written.

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If the plaintiff had himself made the entries in the cash book his testimony would have made them admissible. (*Halsey v. Sinsebaugh*, 15 N. Y. 485; *Russell v. Hudson R. R. Co.*, 17 N. Y. 139; *Howard v. McDonough*, 77 N. Y. 592; *National Ulster Co. Bank v. Mudden*, 114 N. Y. 280; *People v. McLaughlin*, 150 N. Y. 365.)

The fact that the entries were made by his bookkeeper does not under the circumstances detailed make them solely his declaration, or confine positive knowledge of their truth to him, or exclude the plaintiff's equal or superior knowledge of their truth. If the entries in the plaintiff's cash book were but the statement of his bookkeeper and their truth known only by him, they would be hearsay.

But the plaintiff testified that the entries were true when originally made, and identical in amount with the original figures, part of which he made and all of which he examined and approved in the due course of his business, upon which he directed the checks to be drawn, and saw that they were drawn; he knew the entries in the book to be true because the next business day after they were made, in the usual course of his business, he compared them with his original figures which he knew to be true. The plaintiff could testify from memory that the original amounts of the checks agreed with the amount stated upon the corresponding pad, and that the latter amount was truly entered in the book. The pads are destroyed, the checks altered, the entries in the book are unchanged. The plaintiff remembers every material particular except the precise sums thus three times written; one of these writings could be depended upon, and it was properly received.

The defendant relies upon *Peck v. Valentine* (94 N. Y. 569). In that case in order to prove that the defendant had not accounted for all the plaintiff's moneys he had received, one Leggett testified that he made and kept a separate memorandum of the amounts of the moneys as the defendant received them; that he knew the entries to be correct; that he gave the paper to the plaintiff but he did not testify what

the entries were. The plaintiff testified that the paper was lost; that he correctly copied these entries upon it in his memorandum book. It was held that the entries in this book were inadmissible. A careful examination of that case will show that while the book contained a true copy of the lost memorandum, it was not sufficiently shown that the memorandum itself was true. The case is further unlike the one before us in that the defendant had no opportunity of cross-examination of any person testifying to actual knowledge of what the original entries were, and thus did not have the protection such cross-examination would secure.

The judgment should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ., concur.

Judgment affirmed.

**ALEXANDER J. PORTER, Respondent, v. THE TRADERS' INSURANCE COMPANY OF CHICAGO, ILLINOIS, Appellant.**

1. FIRE INSURANCE—INSURED'S REFUSAL TO ANSWER QUESTION—MATERIALITY OF QUESTION A MIXED QUESTION OF LAW AND FACT. The materiality, upon the question of the actual cash value of an insured steamer at the time of its destruction by fire, of the inquiry, made of insured pursuant to a provision of the policy requiring them to submit to an examination under oath, as to the amount they paid for it, is a question of fact or a mixed question of fact and law, when the refusal to answer the inquiry is relied upon as a defense to an action on the policy, where they purchased the steamer from a third person who purchased it, with other property, at a receiver's sale, and they expended \$3,500 upon it after they became the owners.

2. MISTAKE AS TO MATERIALITY. The provision of an insurance policy that the insured shall submit to examination under oath, does not bind them to answer every question propounded, however irrelevant; and if, acting in good faith, they make a mistake in deciding that an inquiry in respect to the price paid for insured property is not, under the circumstances, material on the question as to its cash value at the time of the fire and refuse to answer it, it is not ground for visiting them with a forfeiture of the benefits under the policy.

3. CONSTRUCTION OF PROVISION REQUIRING INSURED TO SUBMIT TO EXAMINATION UNDER OATH. A provision of an insurance policy, the object of which is to prescribe the manner in which an accrued loss is to

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be adjusted and ascertained, that the insured shall submit to examination under oath, is not to be subjected to any narrow or technical construction, but is to be construed liberally in favor of the insured.

*Porter v. Traders' Ins. Co.*, 38 App. Div. 628, affirmed.

(Submitted October 11, 1900; decided November 20, 1900.)

APPEAL from a judgment of the Supreme Court, entered October 3, 1898, upon an order of the Appellate Division in the fourth judicial department, overruling defendant's exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial, and directing judgment for plaintiff upon a verdict directed by the court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

*H. C. Day* for appellant. The policy constitutes the contract between the parties, and all the terms and agreements therein contained must be enforced. (*Hicks v. B. & A. Assur. Co.*, 162 N. Y. 284; *Gross v. S. P. F. & M. Ins. Co.*, 22 Fed. Rep. 74; *Dwight v. G. L. Ins. Co.*, 103 N. Y. 341; *Hill v. Blake*, 97 N. Y. 216; *Æ. Ins. Co. v. People's Bank*, 62 Fed. Rep. 222.) The question asked on the preliminary examination of both Sloan and Cowles, "What did you pay for the *William Harrison*?" was material, relevant and proper, and their refusal to answer constituted a bar to the recovery in this case. (*Clafin v. C. Ins. Co.*, 110 U. S. 81; *Gross v. S. P. F. & M. Co.*, 22 Fed. Rep. 74; *Wells v. Kelsey*, 37 N. Y. 143; *Hoffman v. Connor*, 76 N. Y. 121; *Guiterman v. L., N. Y. & P. S. Co.*, 83 N. Y. 358; *Parmenter v. Fitzpatrick*, 135 N. Y. 190; *Hawver v. Bell*, 141 N. Y. 140; *Matter of Johnson*, 144 N. Y. 563.)

*John M. Hull* for respondent. The defense is purely technical. It is not alleged in the answer, nor was it shown upon the trial, how the questions as to the price paid for the boat were material, or that the defendant was prejudiced or injured in the slightest degree by the refusal to answer. The defend-

ant has no defense upon the merits. (*Solomon v. C. F. Ins. Co.*, 160 N. Y. 595; *McNally v. P. Ins. Co.*, 137 N. Y. 389; *Paltrovitch v. P. Ins. Co.*, 143 N. Y. 73; *Sergeant v. L. & L. & G. Ins. Co.*, 155 N. Y. 349; *Matthews v. A. C. Ins. Co.*, 154 N. Y. 449; *Darrow v. F. F. Society*, 116 N. Y. 537, 544; *Hitchcock v. N. W. Ins. Co.*, 26 N. Y. 69; *Griffey v. N. Y. C. Ins. Co.*, 100 N. Y. 417; *Schmieder v. Kingsley*, 55 N. Y. S. R. 689; *Titus v. G. F. Ins. Co.*, 81 N. Y. 410.)

O'BRIEN, J. This was an action on a policy of fire insurance issued by the defendant on the 7th day of August, 1896, to the firm of Sloan & Cowles, then owners of the steamer *William Harrison*, whereby it insured that vessel against loss or damage by fire in the sum of \$2,500. It was totally destroyed by fire on the seventh day of October following, and subsequently the interest of the insured in the policy was assigned to the plaintiff. At the trial both parties moved for the direction of a verdict, and the court made a direction for the plaintiff for the amount claimed, and ordered the defendant's exceptions to be heard in the first instance at the Appellate Division. That court overruled the exceptions, denied a motion for a new trial and ordered judgment for the plaintiff on the verdict. The only question of law presented arises upon the following provisions contained in the policy: "The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examination under oath, by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices and other vouchers or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the



fire. This policy is made and accepted subject to the foregoing stipulations and conditions." The defendant caused written notice to be served on Sloan & Cowles on the 17th of December, 1896, to appear for examination before a person named in the notice on that day at ten o'clock in the forenoon at a place designated. Both parties appeared in compliance with the notice and were sworn and examined by counsel who appeared for the defendant. It is admitted that they complied in all respects with the provision of the policy referred to, except in one particular. They refused to answer the following question propounded to each of them in the course of the examination: "How much was paid for the steamer?" The failure to answer this question is interposed as a defense by the answer, and is the only defense insisted upon here.

The burden was upon the defendant to show that the insured violated the conditions of the policy in some substantial and material particular. It was stipulated in the policy that the defendant should not be liable beyond the actual cash value of the property at the time of the loss, and that such loss should be ascertained according to such actual cash value, and in no event should it exceed the then cost of replacing the same. The steamer was about thirty years old, but had been repeatedly repaired and practically rebuilt, including the engine, boiler and machinery. The plaintiff purchased the boat sometime prior to 1896 at a receiver's sale with other property and sold her to the insured in May, 1896, taking back a mortgage to which the insurance was collateral.

The question is whether upon an inquiry with respect to the actual cash value of the steamer at the time of the trial, the price paid by the insured before the insurance was effected, under the circumstances stated, was as matter of law, a material inquiry under any and all circumstances. In an inquiry concerning the value of personal property at a given time the price paid by the owner is sometimes, but not always, material. It depends on the nature of the property and its condition when purchased compared with its condition afterwards. There are certain articles that have a standard price in the

market, not subject to much fluctuation, and other things that have no market value at all. In this case it is undisputed that the insured expended \$3,500 on the vessel after they became the owners or procured the insurance. I do not think that it can be held as matter of law that the price paid for the steamer in question, under the circumstances, and before the extensive repairs were made, was a material fact bearing on the actual cash value at the time of the fire. The most that can be said about such a contention is that such an inquiry may be material according to the facts and circumstances of the case. (*Gray v. Central R. R. Co. of N. J.*, 157 N. Y. 483.) It follows that the question whether the inquiry made at the examination, and which the insured declined to answer, was material or otherwise, was not a pure question of law, but one of fact, since its importance must always vary with circumstances, and being a question of fact, or a mixed question of law and fact, the finding of the trial court in favor of the plaintiff cannot be disturbed in this court. Both sides requested the direction of a verdict, and, therefore, all questions in the case were submitted to the trial judge for decision.

The defendant offered no evidence at the trial as to the value of the steamer at the time of the fire, or as to the price paid for her by the insured, but rested the defense entirely upon the refusal to answer the question. If the same question had been propounded to the same person at the trial, and the answer excluded by the court, the ruling would not require a reversal of the judgment, since the inquiry was not so material nor the ruling of such a character as to constitute legal error, and it could not have been more material on the extra judicial examination than it would have been at the trial. On an issue concerning the value, at a given time, of personal property, such as a steamboat that had been long in use, the price paid at some remote period of time, under exceptional circumstances, and when it appears that it was subsequently repaired and changed, is not, as matter of law, necessarily admissible. The court might, in most cases, admit or exclude such proof without committing any legal error. The party

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has no absolute right in all cases to such proof, and the extent to which he may go in this direction is in most cases subject to the discretion of the trial judge.

But the question may also be considered in a broader aspect. The issue presented by the defendant's answer in this respect was that there was, on the part of the insured, a breach of the contract which was a conclusive legal obstacle to a recovery. It is a fundamental principle in the law of contracts that a breach which will defeat a recovery cannot be based upon technical or unimportant omissions or defects in the performance by either party. When a substantial performance is shown the party claiming the benefit of the contract should not be defeated for the want of a literal compliance as to some unimportant detail, and whether omissions or departures from the strict letter are substantial or merely unimportant mistakes is generally a question of fact. (*Miller v. Benjamin*, 142 N. Y. 613.) The provision of the contract as to which a breach is alleged is the agreement of the insured to "submit to examinations under oath by the person named by this company." They did submit to examination. It cannot be claimed that they were bound to answer every question propounded, however irrelevant. They were bound to answer only such as were material, having in view the purpose of the condition. They had no guide as to what was or was not material, except their own judgment, acting of course in good faith. Even if they made a mistake in deciding that the inquiry with respect to the cost of the steamer was not material, it is no ground for visiting them with a forfeiture of all the benefits of the contract, and the principle above suggested should apply.

Finally, it should be noted that the condition alleged to have been violated in this case applied only after the capital fact of a loss. The object of the provision was to prescribe the manner in which an accrued loss was to be adjusted and ascertained. The liability of the defendant having become fixed by the happening of the event, upon which the contract was to mature, conditions which prescribe methods and formalities for ascertaining the extent of it or for adjusting it,

are not to be subjected to any narrow or technical construction, but construed liberally in favor of the insured. (*Solomon v. Cont. F. Ins. Co.*, 160 N. Y. 595; *McNally v. Phœnix Ins. Co.*, 137 N. Y. 389; *Paltrovitch v. Phœnix Ins. Co.*, 143 N. Y. 73; *Sergeant v. L. & L. & G. Ins. Co.*, 155 N. Y. 349; *Matthews v. A. C. Ins. Co.*, 154 N. Y. 449.)

The judgment should be affirmed, with costs.

PARKER, CH. J., BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ., concur.

Judgment affirmed.

THE CITY OF ROCHESTER, Respondent, v. ROBERT WEST,  
Appellant.

1. MUNICIPAL CORPORATION—POWER TO REGULATE ERECTION OF BILLBOARDS. The power conferred upon the city of Rochester by its charter “to license and regulate billposters \* \* \* and to prescribe the terms and conditions upon which any such license shall be granted \* \* \* ” (L. 1880, ch. 14, § 40, subd. 21, as amd., L. 1894, ch. 28, § 9), authorizes an ordinance prohibiting the erection of billboards exceeding six feet in height, except with the permission of the common council, after notice in writing of the application for the permit, to the owners, occupants or agents of all houses and lots within a distance of 200 feet from where such billboard is to be erected.

2. CONSTITUTIONALITY OF CHARTER. The statute conferring such power on the city was within the power of the legislature, and is not in conflict with any provision of the State or Federal Constitution.

3. REASONABLENESS OF ORDINANCE. Such ordinance is not unreasonable or an undue restraint of a lawful trade or business, nor a restraint upon the lawful and beneficent use of private property.

4. VALIDITY OF STATUTE OR ORDINANCE—GENERAL RULE. The validity of a statute or ordinance is not to be determined from its effect in a particular case, but upon its general purpose and its efficiency to effect that end. When a statute is obviously intended to provide for the safety of a community, and an ordinance under it is reasonable and in compliance with its purpose, both the statute and the ordinance are lawful and must be sustained.

*City of Rochester v. West*, 29 App. Div. 125, affirmed.

(Argued October 11, 1900; decided November 20, 1900.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the fourth judicial depart-

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ment, entered May 17, 1898, affirming a judgment of the Monroe County Court, which affirmed a judgment of the Police Court of the city of Rochester convicting the defendant of a misdemeanor.

The defendant is the local manager of a corporation known as the Rochester Bill Posting Company and was arrested April 30, 1897, charged with the violation of sections eight and nine of an ordinance of the city of Rochester, entitled "An ordinance relating to billposting and billboards," adopted by the common council of the city December 22, 1896.

Those sections are as follows: "Sec. 8. No person shall hereafter erect any billboard more than six feet in height within the city of Rochester without permission of the common council. Every applicant for permission to erect a billboard more than six feet in height within said city is required to give one week's notice in writing, personally or by mail, of such application to the owners, occupants or agents of all houses and lots within a distance of two hundred feet from where such billboard is to be erected. No such application shall be considered by the common council without verified proof of the service of the notice herein described, or the written consent of such owners, occupants or agents to the erection of said billboard.

"Sec. 9. No fence or other structure within said city shall be used as a billboard without the consent of the common council. The same notice and proof required by section eight of this ordinance shall be necessary to obtain the consent of the common council to use such fence or structure as a billboard."

Section ten provides for a fine in case of a violation of any of the provisions of the ordinance.

It is admitted that the defendant on April 26, 1897, erected a billboard more than six feet in height on premises fronting on Lake avenue, between White and Spencer streets, and back of the street line without taking any of the steps provided for by the foregoing ordinance. It was also conceded that "Such billboard was erected upon lands leased by the

said Rochester Bill Posting Company, and that such billboard was well constructed of new material," and "that out of six thousand posters put up each week for forty weeks of the year, not more than four hundred would go upon a billboard six feet high."

The case was submitted to the police justice upon these facts, no other testimony being taken, and on June fourth judgment was entered against the defendant for the sum of five dollars.

On appeal the County Court affirmed the judgment. The Appellate Division affirmed the judgment of the County Court and allowed an appeal to this court, certifying the following questions:

"*First.* Whether or not the common council of the city of Rochester has authority, under subdivision 21 of section 40 of its charter, to pass the ordinance under consideration in this case.

"*Second.* Whether or not the ordinance in question is not an unreasonable and an undue restraint upon a lawful trade and business, and also a restraint upon the lawful and beneficial use of private property."

*John R. Fanning* for appellant. The legislature has not granted to the plaintiff's common council the right or authority to pass an ordinance regulating billboards. (L. 1894, ch. 28, § 40.) It is a settled rule that penal statutes are to be construed strictly and not extended by implication. (*Bell v. Doyle*, 11 Johns. 173; *Meyers v. Foster*, 6 Cow. 567; *B. & U. P. R. Co. v. Robins*, 22 Barb. 662; *People v. Rosenberg*, 138 N. Y. 410; *Ramsey v. Gould*, 57 Barb. 398; *Port Wardens v. Cartwright*, 4 Sandf. 236; *Hardy v. City of Brooklyn*, 7 Abb. [N. C.] 403; *People ex rel. v. Bd. of Education*, 143 N. Y. 62; *Hickok v. Trustees of Plattsburgh*, 15 Barb. 435; *Halstead v. Mayor, etc.*, 3 N. Y. 420.) The ordinance, if otherwise valid, is an unlawful interference with a useful trade and occupation, and an unlawful interference with the use of private property. (*Crawford v. Topeka*,

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51 Kan. 756; 23 Am. & Eng. Ency. of Law, 385, 386, 387.)

*P. M. French* for respondent. The charter of Rochester gives its council the right to enact an ordinance on the subject of billposters and billboards. (Dillon on Mun. Corp. [4th ed.] § 89; *Cronin v. People*, 82 N. Y. 318; *City of Buffalo v. N. Y., L. E. & W. R. R. Co.*, 152 N. Y. 276.) The ordinance is valid because it is a proper exercise of the police power and is reasonable. (Dillon on Mun. Corp. § 141; *Colon v. Lusk*, 153 N. Y. 188; *Cronin v. People*, 82 N. Y. 318; *People ex rel. v. Grant*, 126 N. Y. 473; *People ex rel. v. Wurster*, 14 App. Div. 556.)

MARTIN, J. Whether this appeal should be sustained depends wholly upon the validity or invalidity of an ordinance of the plaintiff which forbids the erection, within its limits, of billboards more than six feet in height without the consent of the common council. By its charter the plaintiff was authorized "to license and regulate billposters and bill distributors and sign advertising, and to prescribe the terms and conditions upon which any such license shall be granted, and to prohibit all unlicensed persons from acting in such capacity." (Ch. 14, Laws 1880, § 40, subdiv. 21; as amended, Laws 1894, ch. 28, § 9.) We think this statute conferred upon the common council of the city authority to regulate boards erected for the purpose of bill posting, so far, at least, as such regulation was necessary to the safety or welfare of the inhabitants of the city, or persons passing along its streets. That is precisely what the ordinance in question was intended to accomplish. To regulate is to govern by, or subject to, certain rules or restrictions. It implies a power of restriction and restraint, not only as to the manner of conducting a specified business, but also as to the erection in or upon which the business is to be conducted. (*Cronin v. People*, 82 N. Y. 318, 321.)

Nor do we think that the appellant's claim that this statute

was unauthorized can be sustained. It is obvious that its purpose was to allow the common council to provide for the welfare and safety of the community in the municipality to which it applied. If the defendant's authority to erect billboards was wholly unlimited as to height and dimensions, they might readily become a constant and continuing danger to the lives and persons of those who should pass along the street in proximity to them. That the legislature had power to pass a statute authorizing the city to adopt an ordinance which, if enforced, would obviate that danger, we have no doubt. Nor was it in conflict with any provision of the State or Federal Constitution. The fact that no injury has occurred by reason of the erection of the billboard in question, or that it is improbable that any such injury will occur therefrom, is not controlling upon the question under consideration. The validity of a statute is not to be determined by what has been done in any particular instance, but by what may be done under it. (*Stuart v. Palmer*, 74 N. Y. 183; *Gilman v. Tucker*, 128 N. Y. 190, 200.) It is equally true that the validity of a statute or ordinance is not to be determined from its effect in a particular case, but upon its general purpose and its efficiency to effect that end. When a statute is obviously intended to provide for the safety of a community, and an ordinance under it is reasonable and in compliance with its purpose, both the statute and the ordinance are lawful, and must be sustained. (*Village of Carthage v. Frederick*, 122 N. Y. 268; *People ex rel. O. H. C. Assn. v. Pratt*, 129 N. Y. 68; *Mayor, etc., v. D. D., E. B. & B. R. R. Co.*, 133 N. Y. 104; *City of Rochester v. Simpson*, 134 N. Y. 414; *People v. Havnor*, 149 N. Y. 195, 204.)

We are of the opinion that this ordinance is reasonable; that the legislature authorized its adoption; that the statute in pursuance of which it was passed was valid, and, consequently, that the defendant's appeal cannot be sustained.

It follows that the judgment appealed from should be affirmed. The questions certified to this court are answered as follows:



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Statement of case.

1. The common council of the city of Rochester had authority, under its charter, to pass the ordinance under consideration.

2. The ordinance in question is not unreasonable or an undue restraint of a lawful trade or business, nor a restraint upon the lawful and beneficial use of private property.

O'BRIEN, BARTLETT, HAIGHT, VANN and LANDON, JJ., concur; PARKER, Ch. J., not sitting.

Judgment affirmed, with costs.

DAVID BRADT et al., Respondents, v. JOHN KRANK et al.,  
Appellants.

CONTRACT — WRITTEN AGREEMENT TO PAY DEBT OF THIRD PARTY, NOT A PROMISSORY NOTE. An instrument in writing, by which one promises to pay another a certain sum due from a third party on or before a day named therein, is not a promissory note importing a consideration, and in order to sustain a judgment based thereon a consideration must exist and be proved.

*Bradt v. Krank*, 85 App. Div. 623, reversed.

(Argued October 12, 1900; decided November 20, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 17, 1898, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

*R. J. Cooper* and *Frank Cooper* for appellants. The defendants' promise was not to pay their own debt, nor a promise made upon any consideration moving to them and beneficial to them; but it was a promise to pay the precedent debt of third parties, and it was void under the Statute of Frauds, if oral, and equally void, though in writing, unless the writing be sufficient to satisfy the statute. (*White v. Rintoul*, 108 N. Y. 223; *Strough v. Brown*, 38 Hun, 307; *Browne on Stat. of Frauds*, § 214; *Dillaby v. Wilcox*, 60 Conn. 71; *F. N. Bank v. Chal-*

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mers, 144 N. Y. 434; *Meyer v. Beach*, 14 Hun, 231; *Belknap v. Bender*, 75 N. Y. 446; *Ackley v. Parmenter*, 98 N. Y. 433; *White v. Rintoul*, 108 N. Y. 223; *Berry v. Brown*, 107 N. Y. 659.) Consideration is essential to support a promise or agreement to pay a debt previously incurred by third parties, and unless such consideration is acknowledged by the contract itself, or admitted by the answer, it is necessary to prove it in order to recover thereon. (*Schworm v. Goodrich*, 29 Misc. Rep. 721; *National Bank v. Kauffman*, 93 N. Y. 273; *Barney v. Forbes*, 118 N. Y. 580; *Farnsworth v. Clark*, 44 Barb. 601; *Hall v. Farmer*, 2 N. Y. 557; *Chaffee v. Thomas*, 7 Cow. 358; 1 Pars. on Cont. 391; *Ward v. Hasbrouck*, 44 App. Div. 34.) The writing subscribed by the defendants is not and was not at the time of the trial of this case, April 8, 1898, a promissory note. (L. 1897, ch. 612, § 50; *Prest., etc., v. Hurlin*, 9 Johns. 217; *Kimball v. Huntington*, 10 Wend. 675; *Paine v. Noelke*, 53 How. Pr. 273; *Carnwright v. Gray*, 127 N. Y. 92; *Southwick v. Southwick*, 49 N. Y. 510; *Matter of Davis*, 149 N. Y. 539, 545; *Potter v. Ogden*, 136 N. Y. 384, 390; *Hickox v. Tallman*, 38 Barb. 608; *Stokes v. People*, 53 N. Y. 164.) The pretended agreement in writing, subscribed by the defendants, introduced in evidence by the plaintiffs, is a promise to pay a pre-existing debt of third parties, with no consideration expressed in, or inferable therefrom, and was in fact neither an agreement nor a note or memorandum of any agreement, such as the law sustains as a legal obligation; nor does it correspond in essentials with the agreement the complaint alleges was made. Unless the whole agreement is in writing, and corresponds exactly with the contract set out in the complaint, there is no foundation for this action. (*Wright v. Weeks*, 25 N. Y. 159; *Newbury v. Wall*, 65 N. Y. 484; *Stone v. Browning*, 68 N. Y. 604; *Drake v. Seaman*, 97 N. Y. 230; *Haines v. Smither*, 48 N. Y. S. R. 145; *Martin v. French*, 43 N. Y. S. R. 538; *Clark v. Hampton*, 1 Hun, 612; *Newcomb v. Clark*, 1 Den. 226; *Cameron v. Tompkins*, 72 Hun, 113; *Wood v. Wheelock*, 25 Barb. 625.)

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*John A. Delehanty* for respondents. The instrument upon which this action is founded is a promissory note, and, therefore, imports a consideration. (L. 1897, ch. 612; 1 Rand. on Com. Paper, § 7; 2 Black. Comm. 467; 3 Kent's Comm. 74; Byles on Bills, 5; 1 Daniel on Neg. Inst. 36; Story on Prom. Notes [7th ed.], 2; *Barney v. Worthington*, 37 N. Y. 112; *U. C. Bank v. McFarlan*, 5 Hill, 432; *Bank of Michigan v. Ely*, 17 Wend. 510; *Kimball v. Huntington*, 10 Wend. 675; *Hegeman v. Moon*, 131 N. Y. 467; *Turnpike Co. v. Hurlin*, 9 Johns. 218; *Mott v. H. Nat. Bank*, 22 Hun, 354; *Arnold v. R. R. V. U. R. R. Co.*, 5 Duer, 207; *Mott v. H. Nat. Bank*, 22 Hun, 354; *Hodges v. Shuler*, 22 N. Y. 114; *Frank v. Wessels*, 64 N. Y. 155.) The rule that a non-negotiable promissory note, as well as one negotiable, imported a consideration was not changed, modified or in any manner affected by the enactment of the Negotiable Instruments Law. (*Goodwin v. Roberts*, L. R. [10 Exch.] 337; *Carnwright v. Gray*, 127 N. Y. 92.) The agreement upon which plaintiffs seek to recover is not a collateral agreement to answer for the debt of another, but an original undertaking on the part of the defendants to pay the money specified therein, founded on a valuable consideration, moving to the defendants, and, therefore, not within the Statute of Frauds. (*T. N. Bank v. Parker*, 130 N. Y. 420; *Flagler v. Lipman*, 2 Misc. Rep. 417; *Honsinger v. Mulford*, 90 Hun, 599; *Meltzer v. Doll*, 91 N. Y. 365; *Pratt v. Coman*, 37 N. Y. 440; *M. & F. Bank v. Wixson*, 42 N. Y. 438; *P. C. Co. v. Blake*, 85 N. Y. 226; *Hamer v. Sidway*, 124 N. Y. 539; Pars. on Cont. 444; *Farley v. Cleveland*, 4 Cow. 432; *Slingerland v. Morse*, 7 Johns. 463.)

BARTLETT, J. The cause of action alleged in the complaint is this, in substance: That the plaintiffs were copartners, doing business in Albany, and certain persons, not parties to this action, were partners in trade at Schenectady, under the firm name of Church & Jones; that Church & Jones were indebted to plaintiffs in the sum of \$265.50 for

goods sold and delivered; that plaintiffs sued the claim and were entitled to enter judgment; that defendants, for the purpose of inducing them to withdraw the suit and extend time of payment, made and subscribed a memorandum in writing, whereby they promised and agreed to pay said indebtedness by a day named; that plaintiffs did, in pursuance of the agreement, discontinue suit and extend the time of payment until a day named and duly performed the agreement on their part; that payment was demanded and refused.

The answer denied, on information and belief, the following: The indebtedness of Church & Jones to plaintiffs as alleged; the pending suit and the right to enter judgment; the averment that in conformity with the written memorandum the plaintiffs discontinued action and extended time of payment. It is claimed by plaintiffs that the fifth subdivision of the complaint is not denied, which alleges the execution of the memorandum in writing to induce discontinuance of suit and extension of time to pay the indebtedness.

This claimed omission of the answer seems to be well founded, but the admission, standing by itself and taken in connection with the denial of the other material allegations of the complaint, is of no importance.

With the issues thus framed the plaintiffs' counsel produced at the trial the memorandum in writing referred to, but not set forth in the complaint, and which reads as follows:

"SCHENECTADY, N. Y., Aug. 11, 1897.

"We, the undersigned, John Krank and John L. Mynderse, hereby agree to pay David Bradt, Becker & Co. a bill of two hundred and sixty-five dollars and fifty cents (\$265.50) against Church & Jones between now and Tuesday next.

"(Signed)

JOHN KRANK,

"JOHN L. MYNDERSE."

The plaintiffs' counsel, ignoring the complaint, assumed this written instrument to be a promissory note importing a consideration and rested his case after proving the following facts: The partnership of the plaintiffs; that the defendants resided in Schenectady; the signatures of the defendants to the writing

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produced ; amount of interest due, demand of payment and putting the written memorandum in evidence.

The defendants offered no evidence, but moved for a non-suit on the following grounds : " That the evidence shows that the alleged promise on the part of the defendants was to pay the debt of a third party ; that the written memorandum in evidence is insufficient under the Statute of Frauds ; that it is not either an agreement or a memorandum of agreement ; that it is without consideration so far as it appears on the instrument itself ; that it is simply a naked promise which is void in law ; that it contains nothing to show what the plaintiffs were to do, if anything, on their part of the contract ; in other words, that it is a one-sided contract."

This motion was denied, and the defendants excepted.

Both counsel moved for a directed verdict. The trial judge stated that on the authority of *Hegeman v. Moon* (131 N. Y. 463) he denied the defendants' motion and granted that of the plaintiffs. The defendants' counsel excepted to both rulings.

It is urged on behalf of defendants that the plaintiffs made no attempt to prove the cause of action set forth in the complaint ; that they sued upon a conditional promise of defendants to pay the debt of Church & Jones, and sought by their proofs to change the action into a suit on a promissory note, and that a judgment entered under such a state of the record cannot be sustained on appeal. This objection, if taken at the trial, would be fatal to a recovery. (*Southwick v. First National Bank of Memphis*, 84 N. Y. 420 ; *Truesdell v. Sarles*, 104 N. Y. 167 ; *Romeyn v. Sickles*, 108 N. Y. 650.)

No judgment can be given on grounds not stated in the complaint ; the judgment shall be "*secundum allegata et probata*." No such objection, however, was taken at the trial. It is now argued that the point was raised on the motion to nonsuit, but the record does not sustain this contention.

We will first consider the question whether the instrument in writing, not set forth in the complaint but proved at the trial, is a promissory note.

The trial judge felt constrained by the case of *Hegeman v. Moon* (131 N. Y. 462) to hold that it was. The written instrument under construction in that case reads in its material parts, as follows, viz. :

"One year after my death I hereby direct my executors to pay to Joseph Hegeman \* \* \* the sum of \* \* \* being the balance due him for cash advanced at various times by him to Adrian Hegeman, my son, and others, as per statement rendered by him this day, without interest.

"CORNELIA W. HEGEMAN."

Joseph Hegeman sued the executors of Cornelia W. Hegeman on this instrument.

It was held by this court that the statement in the written instrument that a certain amount was due plaintiff carried with it the implication that it was due from the maker; that the acknowledgment of the indebtedness and that it is due implies a promise to pay it on demand in absence of other directions.

It was further decided that this writing was a promissory note, imported a consideration and was valid notwithstanding it was payable after the death of the maker.

No point raised in *Hegeman v. Moon* is presented in the case at bar save the general contention that the written instrument is a promissory note.

We are also cited to *Carnwright v. Gray* (127 N. Y. 92) as a case in point. The Second Division, with a divided court, held the following instrument to be a promissory note :

"Thirty days after death I promise to pay to Cornelius Carnwright fifteen hundred dollars, with interest."

This decision has no bearing on the case we are considering. The written instrument before us needs no construction, as the language employed is clear; the defendants promise the plaintiffs to pay a debt due them from Church & Jones on or before a day named.

The trial judge erred when he held this writing to be a promissory note, importing a consideration. No consideration

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was proved for the written instrument, and a judgment based thereon cannot be sustained. The plaintiffs should have proved the cause of action alleged in their complaint, the allegations of which were denied.

If they had proved the indebtedness of Church & Jones to them, their action on the claim and the right to enter judgment, and that in pursuance of an agreement made with defendants they discontinued the action and extended the time of payment, they would have been in a position to have claimed that the consideration moving between them and the debtors was sufficient to sustain the written promise of defendants as a special promise to answer for the debt, default or miscarriage of another person under the Statute of Frauds.

While it is true that since that statute was amended in 1863, the agreement, or the note or memorandum thereof, need not express the consideration (2 R. S. 135, § 2, as amended 2 R. S. [Banks' 9th ed.] p. 1886), yet the consideration must exist and be proved before recovery.

The point whether this written instrument, aside from the question of consideration, is in its terms a sufficient compliance with the Statute of Frauds, requiring the agreement to answer for the debt of another to be in writing and subscribed by the party to be charged therewith, is not now presented and we do not pass upon it. It is doubtless true, as suggested by counsel for appellants, that the written instrument does not contain the terms of the contract as set forth in the complaint, but as the case was tried upon a wrong theory which ignored the complaint, the question of the sufficiency of the writing under the Statute of Frauds must await a proper trial of the issues as framed.

The judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

PARKER, Ch. J., O'BRIEN, HAIGHT and VANN, JJ., concur; MARTIN and LANDON, JJ., not sitting.

Judgment reversed, etc.

BENJAMIN F. FORBELL, Respondent, v. THE CITY OF NEW YORK, Appellant.

WATERCOURSES — DIVERSION OF SUB-SURFACE WATERS BY MUNICIPAL WATER WORKS. A municipal corporation which, by the operation of a water system consisting of wells and pumps on its own land, taps the sub-surface water stored in the land of an adjacent owner and in all the contiguous territory, leads it to its own land and by merchandising it prevents its return, whereby the value of the land of such owner is impaired for agricultural purposes, is liable to him in trespass for the damages occasioned thereby.

*Forbell v. City of New York*, 47 App. Div. 371, affirmed.

(Argued October 10, 1900; decided November 20, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered upon an order made January 9, 1900, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The judgment grants a perpetual injunction restraining the city of New York from operating its engines, driven wells and pumping stations known as the Spring Creek Pumping Station in the borough of Queens, city of New York, on the conduit line near the Kings county boundary line, and awards past damages to the plaintiff in the sum of \$6,000, together with the costs of the action.

The plaintiff was a lessee of certain farming lands situated near Spring Creek within the county of Kings. He used a portion of the lands in question for the purpose of growing celery and water cresses.

The city of Brooklyn constructed a pumping station in the place in question early in 1885, and in 1894 sunk additional wells and made an additional pumping station. The effect of pumping at these stations was to lower the underground water table on this land, and thus made it unfit for the cultivation of celery or water cresses, and the crops failed for many years prior to the commencement of this action in 1898.

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*John Whalen, Corporation Counsel* (William J. Carr of counsel), for appellant. The owner of land may dig ditches or sink wells, or in any other manner exercise his dominion over his own land, without being liable at law for the interception or diversion of any underground percolating waters consequent upon such use of his own property. (*Ellis v. Duncan*, 29 Barb. 230; *Goodale v. Tuttle*, 29 N. Y. 459; *Pixley v. Clark*, 35 N. Y. 520; *Vil. of Delhi v. Youmans*, 45 N. Y. 362; *Bloodgood v. Ayers*, 108 N. Y. 400; *Van Wycklen v. City of Brooklyn*, 118 N. Y. 424; *Acton v. Blundell*, 12 M. & W. 324; *Ranstrom v. Taylor*, 33 L. & Eq. 428; *Broadbent v. Ramsbotham*, 34 L. & Eq. 553; *Chasemore v. Richards*, 7 H. L. Cas. 349.) A municipal corporation using its own land, for the purpose of obtaining a water supply for its inhabitants, possesses all the rights over its own property as to underground percolating waters which are incident to the rights of an individual owner over his own soil. (*Chasemore v. Richards*, 7 H. L. Cas. 349; *G. J. C. Co. v. Shugar*, L. R. [6 Ch. App.] 483; *Mayor, etc., v. Pickles*, L. R. [App. Cas. 1895] 587; *Proprietors, etc., v. B. W. S. Co.*, 149 Mass. 478; *Van Wycklen v. City of Brooklyn*, 118 N. Y. 424.)

*Charles Coleman Miller* for respondent. The underground percolating waters in plaintiff's land belong to him, and the abstraction of them by defendant is unlawful. (*Pixley v. Clark*, 35 N. Y. 531; *Smith v. City of Brooklyn*, 18 App. Div. 540; Gould on Waters [2d ed.], § 280; Angell on Watercourses, § 109.) Defendant is a trespasser. (*Prewitt v. Clayton*, 5 B. Mon. 4; *Radcliff v. Mayor, etc.*, 4 N. Y. 195; *Covert v. City of Brooklyn*, 13 App. Div. 188.) The rule of no liability for the interception of underground waters has no application. (*Smith v. City of Brooklyn*, 160 N. Y. 357; *Ellis v. Duncan*, 29 Barb. 230; *Goodale v. Tuttle*, 29 N. Y. 459; *Village of Delhi v. Youmans*, 45 N. Y. 362.)

LANDON, J. The defendant makes merchandise of the large quantities of water which it draws from the wells that it has

sunk upon its two acres of land. The plaintiff does not complain that any surface stream or pond or body of water upon his own land is thereby affected, but does complain and the courts below have found that the defendant exhausts his land of its accustomed and natural supply of underground or sub-surface water, and thus prevents him from growing upon it the crops to which the land was and is peculiarly adapted, or destroys such crops after they are grown or partly grown.

The defendant does not take from his own land simply its natural or accustomed supply or holding, but by means of its appliances and operations it takes and appropriates a large part of the natural and accustomed supply or holding of the plaintiff's land. The case is not one in which, because the percolation and course of the sub-surface waters are unobservable from the surface, they are unknown and thus so far speculative and conjectural as to be incapable of proof or judicial ascertainment.

Before the defendant constructed its wells and pumping stations it ascertained, at least to a business certainty, that such was the percolation and underground flow or situation of the water in its own and the plaintiff's land that it could by these wells and appliances cause or compel the water in the plaintiff's land to flow into its own wells, and thus could deprive the plaintiff of his natural supply of underground water. This it has accomplished just as it expected to do it; the evidence to that effect is about as satisfactory and convincing as if the case were one of surface waters.

That the defendant has so used its own as to injure the plaintiff there is no question. The question is whether the plaintiff has or ought to have in the just administration of the law a remedy.

In *Smith v. City of Brooklyn* (160 N. Y. 357), a case in which the defendant, by means of the same acts and appliances as it employed in this case, lowered the water in the plaintiff's surface stream and pond, this court in holding the defendant liable for the damage thus caused, carefully refrained from considering the question whether the defendant would

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have been liable if it had simply lowered the sub-surface level or body of underground water not contributing to the supply of plaintiff's surface stream or pond.

It may be conceded that the letter of the law, as expounded in many cases in this state, denies liability. (*Ellis v. Dunoan*, 21 Barb. 230; *Goodale v. Tuttle*, 29 N. Y. 459; *Pixley v. Clark*, 35 N. Y. 520; *Village of Delhi v. Youmans*, 45 N. Y. 362; *Phelps v. Nowlen*, 72 N. Y. 40; *Bloodgood v. Ayers*, 108 N. Y. 400; *Van Wycklen v. City of Brooklyn*, 118 N. Y. 424.)

The earlier cases followed the law as stated in *Acton v. Blundell* (12 Mees. & W. 324) and *Greenleaf v. Francis* (18 Pick. 117). So far as the extraction or diversion of underground water upon the land of one proprietor affects no surface stream or pond upon the neighboring land, but simply the underground water therein, the rule is still adhered to.

The reasons usually assigned for the rule are that the owner of the soil may lawfully occupy the space above as well as below the surface to any extent that he pleases; that the water stored or held in his soil so long as it remains there is — unlike water flowing in a surface stream — a part of the soil itself. (*Barkley v. Wilcox*, 86 N. Y. 140.) That a different rule would prevent the reasonable use and improvement of land; that without a grant or positive statute there can be no easement in one parcel of land for the sub-surface support or supply of sub-surface water in another parcel; that the percolation and underground flow of water are out of sight and their exact operation and courses are conjectural and not susceptible of actual observation and proof; and finally that the damages, if any, are the remote or indirect consequence of lawful acts.

It may be conceded that these reasons, or some of them, were ample to afford the proper rule of decision in the cases to which they were applied. We do not intend to impair their applicability to like cases. But there are features of this case to which these reasons do not apply. As already intimated, the defendant installed its pumping plant knowing

that the underground operation and habit of this store of water in its own and neighboring lands, including the plaintiff's, a total area of from five to eleven square miles, would enable it to capture the greater part of it.

In the cases in which the lawfulness of interference with percolating waters has been upheld, either the reasonableness of the acts resulting in the interference, or the unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land, has been recognized.

In the absence of contract or enactment, whatever it is reasonable for the owner to do with his sub-surface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely tapped, and their value impaired.

The learned trial judge found that the acts of the defendant were a trespass. No doubt trespass may be committed by the projection of force beyond the boundary of the lot where the projecting instrument is operated. Injuries caused by explosions are familiar instances. We think the finding justified by the particular facts of this case. Force is not necessarily direct violence. It may be produced by the employment of such material agencies or instruments as become effective by the co-operation of the forces of nature, and such is the case before us.

The distinction between a case like this and the cases of percolating waters in which liability has been denied was well pointed out by the learned judge who wrote for the Appellate Division in *Smith v. City of Brooklyn* (18 App. Div. 340). We refer to the opinion as a valuable contribution to the discussion of the subject.

We more readily conclude to affirm, because the immunity from liability which the defendant claims violates our sense of justice. It seems to pervert just rules to unjust purposes; it does wrong under the letter of the law in defiance of its spirit. The case is certainly unlike those which have preceded it in this court, and we may consider the rules announced in the previous cases in the light of the cases themselves. We recognize the fact that the water supply of a great city is of vastly more importance than the celery and water cresses of which the plaintiff's land was so productive, before the defendant encroached upon his water supply. But the defendant can employ the right of eminent domain, and thus provide its people with water without injustice to the plaintiff.

The judgment should be affirmed, with costs.

PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN and VANN, JJ., concur; O'BRIEN, J., not voting.

Judgment affirmed.

TRUMAN E. DAVIS, Respondent, v. NORMAN BLY, Appellant,  
Impleaded with Another.

1. PROMISSORY NOTE — LIABILITY FOR INDORSEMENT BEFORE DELIVERY TO PAYEE. Where a note is indorsed before its delivery to the payee at the request of the maker, the indorser knowing before such indorsement that his name is required by the payee as a condition of making the loan to, or procuring it for, the maker and as security for its payment, the indorser is placed in the same relation to the payee as if he had indorsed by express agreement with him, and is liable as first and not as second indorser.

2. PRESUMPTION ARISING FROM FACE OF NOTE NOT CONCLUSIVE. The presumption arising from the face of a note that one who indorsed the

same before delivery to the payee is not liable to the latter, is not conclusive, and may be overcome by evidence that he intended to become liable as first, and not as second, indorser.

*Davis v. Bly*, 32 App. Div. 124, affirmed.

(Argued October 11, 1900; decided November 20, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 21, 1898, upon an order reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term, and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*C. C. Van Kirk* for appellant. No cause of action was shown against the defendant Bly, and the plaintiff was properly nonsuited. (*Herrick v. Carman*, 12 Johns. 159; *Murphy v. Merchant*, 14 How. Pr. 189; *Bradford v. Martin*, 3 Sandf. 647; *Hull v. Martin*, 2 T. & C. 420; 59 N. Y. 652; *Lester v. Paine*, 39 Barb. 616; *Wilds v. R. R. Co.*, 24 N. Y. 430; *Deyo v. R. R. Co.*, 34 N. Y. 9; *Dwight v. G. Ins. Co.*, 103 N. Y. 359; *Linkhauf v. Lombard*, 137 N. Y. 417; *Hemmens v. Nelson*, 138 N. Y. 517.)

*Francis A. Smith* for respondent. The evidence must be construed in the light most favorable to plaintiff, and if different conclusions might be drawn from the facts proven, it was the province of the jury to draw them. (*Higgins v. Eagleton*, 155 N. Y. 466; *Powell v. Powell*, 71 N. Y. 71; *Jaffray v. Brown*, 74 N. Y. 393.) The facts and circumstances disclosed by the evidence were sufficient to charge the defendant Bly as first indorser. (*Moore v. Cross*, 19 N. Y. 227; *Meyer v. Hilscher*, 47 N. Y. 265; *Coulter v. Richmond*, 59 N. Y. 478; *Jaffray v. Brown*, 74 N. Y. 393; *Witherow v. Slayback*, 158 N. Y. 649; *McPhillips v. Jones*, 73 Hun, 516; *Cumming v. Roderick*, 16 App. Div. 339.)

VANN, J. This action was brought upon a promissory note of which the following is a copy:

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“\$200.

CROWN POINT, N. Y., *Oct. 1st, 1895.*

“One year after date I promise to pay to the order of Truman E. Davis two hundred dollars at \* \* \* value received with interest.

C. D. GAGE.”

Indorsed: “NORMAN BLY.”

The plaintiff, although payee of the note, sought to recover from Bly upon the allegation that the latter indorsed at the request of the maker for the purpose of giving him credit with the plaintiff, who, in reliance upon the indorsement, accepted the note and lent the maker \$200 thereupon.

The defendant Bly alone answered, denying that he indorsed for the purpose of giving Gage credit, and alleging that his indorsement was to give the plaintiff credit and to enable him to get the note discounted. At the close of the evidence for the plaintiff the court granted a nonsuit, but the judgment entered accordingly was reversed by the Appellate Division and the defendant Bly now comes here.

It appeared from the testimony of the plaintiff that at about the date of the note Gage, the maker, applied to him for a loan of \$200, stating that he would give him a note with a good backer if he would advance the money on it. The plaintiff told him that he had the money, and with a good backer he would let him have the amount he wanted. Gage thereupon said, “How will Mr. Bly be?” and the plaintiff replied, “Mr. Bly will be all right.” The next day Gage delivered the note indorsed by Bly to the plaintiff, who, relying solely upon said indorsement, let him have \$200 upon it.

Gage was sworn as a witness for the plaintiff, and testified that at about the time the note was given he was owing the plaintiff for some fertilizer which he had purchased of him, and that the plaintiff had requested payment therefor. Gage told him that he had not the money, but wanted to borrow some to pay him and others, and inquired if the plaintiff knew where he could get a couple of hundred dollars. The plaintiff replied that a friend of his had some money in trust that he could get on a good note or security.

Gage then applied to Mr. Bly, who had been in the habit

of indorsing for him, and asked if he would indorse a note for him. Mr. Bly replied that he would rather Gage would get some one else. Shortly afterward Gage again saw Bly, who asked him if he had an indorser for the note, and Gage said no. Bly asked if he had the note with him, and thereupon Gage showed him the note and asked him if he would indorse it. Bly replied, "Yes, he would indorse that as he considered Davis good enough and did not need any indorsement," and accordingly he indorsed it. During one of these conversations Gage told Bly that he had applied to another person to indorse the note, but he had refused. He also told Bly that the plaintiff had said he could get the money for him on the note or on a good note. All this occurred before Bly indorsed the note. Upon his cross-examination Gage testified: "I told Mr. Bly that Davis told me that he could get the money on a good note. Q. Did he say from whom he could get it? A. No, sir." On his redirect examination Gage testified: "Q. I understand you to say that Mr. Davis said in substance to you that he could get the money for you on a good note? [Objected to as already answered.] Q. But you told Mr. Bly what you have testified to as to the conversation between you and Mr. Davis; is that so? A. Yes, sir."

This is the substance of the testimony so far as it related to the principal issue. From this evidence the jury might have inferred that Bly knew that Gage was negotiating with the plaintiff for a loan; that the plaintiff required an indorser as a condition of making or procuring the loan; that Bly had loaned the credit of his name to Gage before by way of indorsement; that Bly knew that the plaintiff did not regard Gage as good; that Bly, however, regarded the plaintiff as good; that the note when shown to Bly was payable to the order of the plaintiff, yet Gage told him that he had no indorser, but needed one, and finally that Bly indorsed the note to enable Gage to comply with plaintiff's requirement of a good indorser.

The statement of Bly that he would indorse, as he thought the plaintiff was good, is not conclusive upon the question of



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intent, for that remark, which may have been merely a self-serving declaration, is to be considered in connection with what Bly did and what he knew when he did it. Bly was not sworn, and the jury might have read between the lines of Gage's testimony that he was trying to take care of his indorser. The note was to run for a year and was not payable at any specified place, so that it could not have been used at a bank in the ordinary course of affairs. As was said by the court below, "No good reason appears in the case for the plaintiff wanting the indorsement of Bly if he himself expected to become the first indorser. The plaintiff, as Gage told Bly, wanted Gage to bring him a good note, not one that he could make good by himself becoming the first indorser."

Whether the plaintiff was to make the loan or procure it is of no importance, for, as we have held, "It is not necessary that the indorser should know the precise nature of the credit to be procured. It is sufficient that he knows that a credit is to be obtained of the payee." (*Coulter v. Richmond*, 59 N. Y. 478, 483.) If Bly indorsed with the knowledge that his name was required by the payee as a condition of making or procuring the loan, and as security for its payment, he was placed in the same condition in relation to the payee as though he had indorsed by express agreement with him. (*Meyer v. Hibsher*, 47 N. Y. 265.)

The plaintiff was entitled to the most favorable inferences warranted by the evidence, and, notwithstanding the presumption arising from the face of the note, the jury might have found that the appellant intended to become liable as first and not as second indorser. (*Moore v. Cross*, 19 N. Y. 227; *Jaffray v. Brown*, 74 N. Y. 393; *Witherow v. Slayback*, 158 N. Y. 649.)

The judgment of the Appellate Division should be affirmed, and judgment absolute directed for the plaintiff under the defendant's stipulation, with costs in all courts.

O'BRIEN, BARTLETT, HAIGHT and MARTIN, JJ., concur; PARKER, Ch. J., and LONDON, J., not sitting.

Judgment affirmed.

In the Matter of the Application of MARGARET TOBIN, Respondent, for a Peremptory Writ of Mandamus Directed to JOHN J. SCANNELL, as Fire Commissioner of the City of New York and as Trustee of the New York Fire Department Life Insurance Fund, Appellant.

1. NEW YORK CITY—FIRE DEPARTMENT FUND FOR BENEFIT OF WIDOWS AND ORPHANS. A member of the fire department of the borough of Brooklyn, who is within the provision of law for the creation of an insurance fund for the benefit of widows and orphans of its members (L. 1888, ch. 583, tit. 13, § 15; as amd., L. 1889, ch. 153; L. 1897, ch. 378, § 791), may not, on retiring from its membership and becoming a pensioner, have his name taken from the list of subscribers to that fund, and the amount of his contribution, as prescribed by the statute, should be deducted from his monthly pension, notwithstanding his name is stricken from the list and he ceases to be a contributor.

2. RIGHTS OF WIDOW OF RETIRED FIREMAN IN FUND. The widow of a retired fireman who at the time of his retirement had rights in such fund is entitled to its benefits although after his retirement he requested his name to be taken from the list of subscribers and voluntarily ceased to be a contributor.

*Matter of Tobin*, 53 App. Div. 453, affirmed.

(Submitted October 3, 1900; decided November 20, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered July 17, 1900, reversing an order of Special Term denying the application of Margaret Tobin for a peremptory writ of mandamus requiring the fire commissioner of the city of New York to pay to her a pension and granting said writ.

John Tobin, the husband of the relator, was a fireman in the fire department of Brooklyn for ten years prior to November 1, 1895, when he was retired upon a pension. He died about four months afterwards. During his membership he had contributed to the "Widows' and Orphans' Relief Fund." Upon his retirement he requested his name to be taken from the list of subscribers to that fund. He assigned as a reason that his relations with his wife were not satisfactory. His

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name was accordingly taken from the list, and he thereafter contributed nothing.

The charter of the city of Brooklyn contained provisions, substantially re-enacted in the charter of Greater New York, providing for two funds, one a "Fireman's Insurance Fund," made up of fines, rewards, fees, donations, and the percentage or tax on foreign insurance companies. From this fund Tobin received his pension. The other was the "Widows' and Orphans' Relief Fund," from which the relator, the widow of Tobin, claims a pension.

The administration of both funds is now committed to the respondent, the fire commissioner of the city of New York, without change as to the rights of persons claiming benefits therefrom. (Chap. 378, sec. 791, Laws 1897.) The respondent refused to allow the relator a pension because her husband had voluntarily ceased to be a contributor to the fund for that purpose.

The charter of the city of Brooklyn (Chap. 585, Laws 1888, title XIII, sec. 15, as amended by chap. 153, Laws of 1889) provided, among other things, as follows :

"There shall be deducted by the comptroller of the city of Brooklyn, from the monthly pay of each officer and fireman of said department, and from that of the other employees of said department, as shall desire to avail themselves of this provision, and by the trustees of the firemen's insurance fund from the monthly pension of such retired members of the department who had contributed to said fund before retirement, the monthly sum of one dollar, which shall be received and held by the trustees of the insurance fund herein created, in the like manner as the other moneys herein provided to be paid to them, and which shall be known as the Brooklyn Fire Department Widows' and Orphans' Relief Fund; and in case of the death of any member or employee of said department in the service thereof, or retired pensioner, so contributing, there shall be paid to the widow or legal representative of such deceased member or employee or retired pensioner, the sum of one thousand dollars out of the money so assessed; and in

the case by reason of the number of deaths, the aggregate amount of the money so provided to be assessed and collected should prove inadequate to make such payment, then the assessment may, in the discretion of the trustees, be increased to not exceed the sum of two dollars in such month's pay. The said commissioner of the fire department of the city of Brooklyn may direct the trustees of the Brooklyn fire department Widows' and Orphans' Relief Fund to pay from said fund to the widow of any deceased retired pensioner of said fire department who had contributed to the said fund previous to his said retirement, and who, by reason of said retirement, was debarred from further contributing to or receiving any of the benefits of said fund, such sum of money as the widow of said retired pensioner would have been entitled to receive if said retired pensioner had not been retired from said fire department at the time of his death."

*John Whalen, Corporation Counsel (William J. Carr of counsel), for appellant.* The relator has no legal right to the relief sought in this proceeding. (L. 1888, ch. 583; L. 1889, ch. 153; *Hagadorn v. Raux*, 72 N. Y. 586; *Mayor, etc., v. Furze*, 3 Hill, 612; *Livingston v. Tanner*, 14 N. Y. 64; *Hutson v. Mayer*, 9 N. Y. 163.)

*Eugene V. Brewster for respondent.* Contributions to the widows' fund were compulsory as to officers and firemen, and were entirely beyond their personal control. (*Blashko v. Wurster*, 156 N. Y. 437; *People v. Jaehne*, 103 N. Y. 182.) The relator's deceased husband having contributed to the widows' fund up to the time of his retirement, the relator is entitled to the benefit from said fund. (*People ex rel. v. Supervisors*, 51 N. Y. 401; *Hagadorn v. Raux*, 72 N. Y. 586; *Smith v. Floyd*, 140 N. Y. 337.)

LANDON, J. In determining whether the deduction of one dollar from the monthly pay of a fireman, and from the monthly pension of the retired members of the department

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who had contributed to the widows' and orphans' relief fund before retirement, was voluntary or compulsory, it is proper to notice :

1. The widows' and orphans' relief fund was derived from the deductions from the monthly pay of officers and firemen of the department, and of other employees of the department who should desire to avail themselves of its benefits, and also from the monthly pensions of such retired members of the department as had contributed to said fund before retirement.

2. The firemen's insurance fund was derived from other sources.

3. A member of the department, such as was the relator's husband while in the uniformed force, who, after serving ten years, became disabled, was entitled to his discharge, and could be awarded a pension from the firemen's insurance fund.

4. Under the Brooklyn charter, and as is apparent from the provisions above quoted, an "employee" was not a "member" of the fire department, and, therefore, could receive no pension from the firemen's insurance fund.

5. The distinction between retired members who had contributed to the widows' and orphans' relief fund before retirement and those who had not so contributed was, no doubt, made because at the time of the original enactment for the establishment of the fund the members who had already retired had not contributed anything to the fund, and could not have done so. Thus the distinction was due to the situation, and not to the intention to confer an option.

This fact explains the meaning of the words "so contributing" in the provision :

"In case of the death of any member or employee of said department in the service thereof, or retired pensioner *so contributing*, there shall be paid to the widow or legal representative of such deceased member or employee or retired pensioner the sum of one thousand dollars so assessed."

It is thus obvious that the option of contribution was limited to employees and that as to members the contribution was in

fact an assessment; that, as the relator's husband was a member for years after the enactment of the provision respecting the widows' and orphans' relief fund, he could not fall within the class of members retired before its enactment, and, therefore, not within the non-contributing class. He was in fact a contributing member during his active service, and after his retirement the trustees of the firemen's insurance fund should, under the mandate of the statute, have deducted one dollar from his monthly pension for the benefit of the relief fund, notwithstanding his unwillingness to be thus "assessed."

The order should be affirmed, with costs.

O'BRIEN, HAIGHT, MARTIN and VANN, JJ., concur; PARKER, Ch. J., and BARTLETT, J., not voting.

Order affirmed.

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CHARLOTTE D. OTTO, Respondent, v. CHARLES VAN RIPER et al., Appellants.

1. **PRINCIPAL AND SURETY — LIABILITY OF SURETIES ON GUARDIAN'S BOND.** The fact that money, belonging to the guardian of an infant and paid to the sureties on his bond as security for their liability and deposited by them to the joint account of themselves and the guardian in a trust company, is lost by the failure of the company, does not operate to discharge the sureties from their liability to make good money of the infant received by the guardian and misappropriated by him.

2. **WHEN PRIOR ACCOUNTING OF GUARDIAN IS NOT A CONDITION PRECEDENT TO SUIT IN EQUITY AGAINST SURETIES.** Where it is impossible for a ward, by reason of the removal of the guardian to another state and his death there intestate, without leaving any property in either state, to obtain a judicial settlement of the guardian's accounts in a direct proceeding, such settlement is not a condition precedent to a suit in equity against the sureties on the bond for the purpose of having it adjudged whether there was anything due from the guardian to the ward, and, if so, to charge the sureties with the amount.

*Otto v. Van Riper*, 81 App. Div. 278, affirmed.

(Argued October 12, 1900; decided November 20, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July

22, 1898, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

*J. Wilson Bryant* for appellants. The complaint should have been dismissed because the plaintiff has alleged in her complaint and also admitted at the trial that the guardian was dead; that no personal representative had been appointed, and that the guardian nor his representatives in this case had ever been called upon to account, and no account has been filed, and this defense had been pleaded as well as an allegation that the plaintiff has an adequate remedy at law. (*Perkins v. Stimmel*, 114 N. Y. 359; *Douglas v. Ferris*, 138 N. Y. 193; *Bieder v. Steinhower*, 15 Abb. [N. C.] 430; *Stillwell v. Mills*, 19 Johns. 304; *Trust Co. v. Pratt*, 25 Hun, 23; *Hood v. Hood*, 85 N. Y. 561; *Haight v. Brisbin*, 100 N. Y. 219; *Reed v. Stryke*, 12 Abb. Pr. 47; *Turner v. Conant*, 18 Abb. [N. C.] 160.) The guardian is bound to use only ordinary care and prudence in his management of the estate; he is only liable for losses to the estate occurring through his negligence or laches. (2 Kent's Comm. 230; *Furman v. Coe*, 1 Caines, 96; *Ward v. Stahl*, 81 N. Y. 406; *Clark v. Montgomery*, 23 Barb. 561; *Hoag v. Prime*, 24 N. Y. S. R. 476; *P. M. Co. v. Toll*, 85 N. Y. 646; *Myers v. U. S.*, 1 MacL. 493; *Farrar v. U. S.*, 5 Pet. 372, 389; *Bissell v. Saxton*, 66 N. Y. 55; *Kellum v. Clark*, 97 N. Y. 393.) The guardian and his sureties had the right, and they were authorized and justified in depositing the money belonging to the estate in the bank, and they are not liable for its failure and subsequent loss of the fund. (*Paisley v. Martin*, 77 Va. 376; *Matter of Stafford*, 11 Barb. 353; *Routh v. Howell*, 3 Ves. 565; *Poultney v. Randall*, 9 Bosw. 232; *King v. Talbot*, 40 N. Y. 76; 2 Story's Eq. Juris. §§ 1269, 1270; Lewin on Trusts, 295; *McCabe v. Fowler*, 84 N. Y. 314; *Baskin v. Baskin*, 4 Lans. 94.) It was perfectly legitimate for the sureties to take security from the guardian as an indemnity for reimbursement. (9 Am.

& Eng. Ency. of Law, 141; *Poultney v. Randall*, 9 Bosw. 232; *Rapp v. Masten*, 4 Redf. 76; *Jones v. Quinnepiack*, 29 Conn. 25.)

*Omar Powell* and *Daniel L. Cady* for respondent. Where an accounting under section 2606 of the Code of Civil Procedure is impossible or impracticable, an action in equity to establish the extent of the liability and charge the bondsmen is proper. (*Bischoff v. Engel*, 10 App. Div. 240; *Carow v. Mowatt*, 2 Edw. Ch. 57; *T. & D. Co. v. Pratt*, 25 Hun, 23.) The fund having been lost through breach of duty by John H. Schilling and never restored, the devastavit is established. (*Matter of King v. Talbot*, 40 N. Y. 76; *Le Fevre v. Hasbrouck*, 2 Dem. 567; *Ackerman v. Emott*, 4 Barb. 656; *Matter of Cant*, 5 Dem. 269; *Matter of Bushnell*, 17 N. Y. S. R. 813; *Lewin on Trusts*, 295, 296; *Deobold v. Oppermann*, 111 N. Y. 531; *Matter of Myers*, 131 N. Y. 409; *Butler v. Jarvis*, 51 Hun, 245; *Ex parte Stafford*, 11 Barb. 353; *Caulkins v. Bolton*, 98 N. Y. 511.)

O'BRIEN, J. The recovery in this action was upon a bond given by the defendants as sureties upon the appointment of the plaintiff's father as her general guardian, she being at that time an infant.

It is undisputed that the guardian received, at or about the time of his appointment, the sum of five hundred dollars, which belonged to the plaintiff, and for which he has never accounted. The main defense to the action is based upon the following facts found by the trial court: It appears that the defendants on becoming the sureties for the guardian, in order to indemnify themselves from any loss, procured him to execute and deliver to them a mortgage upon certain property which the guardian then owned; that subsequently the premises covered by the mortgage were sold, and from the proceeds of the sale the sum of \$2,450 was paid over to the defendants and deposited by them in the American Loan and Trust Company to the joint account of the guardian and the two defend-



ants who were sureties ; that the money remained on deposit in the trust company until April, 1891, when it became insolvent and the fund was wholly lost. The trust company had power to receive deposits and to act as trustee, receiver, administrator and guardian of infants and their estates. If the fund so deposited was a trust fund held by the guardian, under the circumstances found, and it had been lost without his fault, it may be that both he and his sureties would be held not liable. But this is not a case where trust funds have been lost by a trustee acting in good faith, and the legal principles applicable to such a case are not pertinent to this. The mortgage taken by the sureties never belonged to the plaintiff. It was taken for their individual benefit, in order to secure themselves against any possible future loss by some act on the part of the guardian. When the money was realized upon this mortgage, by the sale of the property, the fund took the place of the original security and belonged to the defendants, and they had absolute and complete control over it just as they had over the mortgage from which it was derived. When they deposited this fund with the trust company it was a deposit of their own funds. The fact that the deposit was made to the credit of the two sureties and the guardian jointly does not change the question. The guardian as an individual had no doubt an interest in the fund, which accounts for the form of the deposit, but it was no part of the fund which came into his hands as guardian or which belonged to the plaintiff, his ward. The guardian individually and the two sureties had complete control over it and could have drawn it out of the trust company at their own pleasure. It was not even set apart for the benefit of the plaintiff and never became impressed with any trust in her favor which she could have enforced. The deposit, therefore, did not represent any investment of the plaintiff's funds made by the guardian for her benefit in good faith or otherwise ; and the fact that the deposit was lost by the subsequent failure of the depository is no defense to the plaintiff's claim. With respect to the plaintiff, the case is just the same as if the deposit did

not represent the proceeds of the mortgage, but was some other individual fund of the defendants or the guardian himself.

The defendants' obligation was expressed in the conditions of the bond, and these conditions were that if the guardian should in all things faithfully discharge the trust reposed in him and obey all lawful directions of the surrogate touching the trust, and render a just and true account of all moneys and other property received by him and of the application thereof and of his guardianship, whenever required so to do by a court of competent jurisdiction, then the obligation should be void, otherwise to remain in full force and virtue. The responsibility thus assumed by the defendants has never been discharged, and, therefore, we think the facts found constitute no defense to the action.

It was also urged as a defense that the guardian was dead, and that no personal representative had been appointed, and that neither the guardian nor his personal representative had ever been called upon to account, and that no account had ever been filed. It appears that subsequent to the loss of the fund in the trust company, the guardian removed to another state where he died in the year eighteen hundred and ninety-six, intestate, leaving no estate or property either in this state or the state of his residence, and that no personal representative had ever been appointed in either state. Of course, it was impossible, under these circumstances, for the plaintiff to procure a judicial settlement of the account between herself and her guardian. The form of this action is in equity, and the demand for judgment is that it be found and decreed to be due to the plaintiff from her guardian the sum of money received by him, with interest thereon, and, further, that the defendants be charged as sureties with the amount so found due. It is doubtless the general rule that an action cannot be maintained against the sureties upon the bond of a general guardian until proceedings for an accounting have been had against the guardian and his default established therein. (*Perkins v. Stimmel*, 114 N. Y. 359.) But this principle is not of universal application. Where it appears that an

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accounting is impossible or impracticable, an action in equity to establish the extent of liability and charge the sureties is proper. (*Long v. Long*, 142 N. Y. 545; *Haight v. Brisbin*, 100 N. Y. 219.)

We think that the record does not present any legal error that would justify us in interfering with the judgment, and it should, therefore, be affirmed, with costs.

PARKER, Ch. J., BARTLETT, HAIGHT, VANN and LANDON, JJ., concur; MARTIN, J., not sitting.

Judgment affirmed. \_\_\_\_\_

HARVEY A. SWEETLAND, Respondent, v. FRANKLIN S. BUELL,  
Individually and as Executor of JONATHAN S. BUELL,  
Deceased, et al., Appellants.

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1. REQUEST FOR DIRECTION OF VERDICT — WAIVER OF RIGHT TO GO TO JURY. Defendants who stand upon their motion for the direction of a verdict in their favor and upon their exceptions to the direction of a verdict for plaintiff and to the refusal to direct a verdict in their favor, without requesting the submission of any specified questions of fact, thereby submit them to the court, and waive their right to go to the jury.

2. JUDGMENT — LIEN OF, AS AGAINST A BONA FIDE PURCHASER WITHOUT NOTICE BEFORE DOCKET. Under sections 1 and 8 of chapter 50 of 1 Revised Laws of 1813, no judgment affecting any lands, tenements, real estate or chattels real had any preference until the record thereof had been filed and docketed as against a *bona fide* purchaser of such real property for a valuable consideration, and a deed given by the judgment debtor for a consideration expressed therein upon the day judgment was entered, without proof that the judgment was entered first, or that the purchaser had actual or constructive notice thereof, is valid as against the judgment.

3. RULE THAT DEED TO ONE COTENANT INURES TO EQUAL BENEFIT OF THE OTHER — WHEN NOT APPLICABLE. The rule that the purchase of an outstanding title by one of two tenants in common of real property inures to the benefit of his cotenant as well as himself does not apply where the deed claimed to create the cotenancy did not convey any title because the grantor had previously parted with all his title, since in that case the relation of tenants in common does not exist.

4. TENANCY IN COMMON — ADVERSE POSSESSION — OUSTER — CONVEYANCE OF ENTIRE ESTATE BY ONE TENANT IN COMMON. If one tenant in common of real property assumes to sell and convey the entire estate, apparently doing so, and his grantee assumes to take it and goes into

possession, and he and his grantees hold the same for more than forty years, the possession thus taken and held may be treated as an ouster of the cotenant, and constitutes adverse possession.

5. EVIDENCE AS TO CAPACITY IN WHICH GRANTEEES TAKE, WHEN IMMATERIAL. The rejection of a certified copy of the inventory of an estate filed by executors, upon the question whether they took as executors, or as tenants in common in their own right, under a deed executed to them, is not reversible error in an action to compel the determination of an adverse claim of title based on such deed, where, in either event, such deed conveyed no title as against the title under which the plaintiff claims.

6. PRESUMPTION OF DELIVERY FROM RECORD OF DEED. The fact that deeds are recorded raises the presumption that they were recorded by the grantee, and proof of that fact is *prima facie* and presumptive evidence of delivery.

*Sweetland v. Buell*, 89 Hun, 543, affirmed.

(Argued October 12, 1900; decided November 20, 1900.)

APPEAL from a judgment of the Supreme Court, entered July 3, 1896, upon an order of the late General Term in the fifth judicial department, overruling defendants' exceptions ordered to be heard in the first instance at General Term, denying a motion for a new trial and directing judgment for plaintiff upon a verdict directed by the court on trial at Circuit.

The nature of the action and the facts, so far as material, are stated in the opinion.

*George Wadsworth* for appellants. The deed from Williams Holt to Joseph Clary did not vest the title in Clary as sole tenant, but it inured to the benefit of his cotenants. One tenant in common cannot buy out an outstanding or adverse title so as to defeat the rights of his cotenants. The purchase will inure to their common benefit, subject to the equal contribution of the expense. (*Van Horne v. Fonda*, 5 Johns. Ch. 388; *Phelan v. Kelly*, 25 Wend. 389; *Burrell v. Bull*, 3 Sandf. Ch. 15; *Jackson v. Streeter*, 5 Cow. 529; *Burnham v. Van Zandt*, 7 N. Y. 523.) The agreement of one tenant in common to sell does not bind the others. The conveyance by one tenant in common does not pass the interest of his cotenant. (*Erwin v. Olmsted*, 7 Cow. 229; *Blood v. Good-*

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*rich*, 9 Wend. 68.) The proof of possession by the plaintiff and his grantors is not sufficient to defeat the rights of the heirs at law of Asa Rice and their grantee. Such heirs at law and their grantee are, and at all times have been, tenants in common of these premises with Joseph Clary and his grantees. (*Hulse v. Hulse*, 23 N. Y. S. R. 123; *Bliss v. Johnson*, 94 N. Y. 235; *Doherty v. Matsell*, 119 N. Y. 646; *Kathan v. Rockwell*, 16 Hun, 90.) To establish adverse possession by a tenant in common such as will effect the ouster of his cotenant, notice in fact to the latter of the adverse claim is required, or unequivocal acts, open and public, making the possession so visible, hostile, exclusive and notorious that notice may fairly be presumed. (*Culver v. Rhodes*, 87 N. Y. 348; *Wainman v. Hampton*, 110 N. Y. 429; *Buttery v. R., W. & O. R. R. Co.*, 14 N. Y. S. R. 131; *Brandt v. Ogden*, 1 Johns. 156; *Doe v. Campbell*, 10 Johns. 475; *Jackson v. Leonard*, 9 Cow. 653; *Hamerschlag v. Duryea*, 38 App. Div. 130.) The defendants set up a claim to the premises and demanded affirmative relief. They, therefore, were entitled to submit to the jury the question whether or not the possession of the plaintiff or his grantors was and had been adverse to the title of their tenants in common, and the court erred in directing a verdict for the plaintiff without submitting that question to the jury. (*King v. Ross*, 85 N. Y. S. R. 138.)

*Clark II. Timerman* for respondent. The title by warranty deeds in the plaintiff was perfect. (*Webster v. Van Steenberg*, 46 Barb. 211; *Ring v. Steele*, 2 Keyes, 450.) The deed stands on record and that is sufficient proof of its delivery. The deed is presumed to have been recorded by the grantee, and the fact that it is on record is *prima facie* and presumptive proof of delivery and conveyance of title. (*Wilsey v. Dean*, 44 Barb. 354; *Sutton v. Warsling*, 108 N. Y. 520.) The sheriff's deed under which the defendants claim title did not convey any title to defendants and was void as against Williams Holt. (*Buchanan v. Sumner*, 2 Barb. Ch. 165; *Clark v. Dakin*, 2 Barb. Ch. 36; *Jackson v. Dubois*,

4 Johns. 216; *Cory v. Cornelius*, 1 Barb. Ch. 571; *Jackson v. Ellston*, 12 Johns. 452; *Day v. Dunham*, 2 Johns. Ch. 182; *Jackson v. Burgott*, 10 Johns. 457; *Bockes v. Lansing*, 74 N. Y. 437; *Jackson v. Roberts*, 11 Wend. 422; *Goldman v. Kennedy*, 49 Hun, 157.) The title of the plaintiff was complete through adverse possession. (*Baker v. Oakwood*, 123 N. Y. 16; *O'Connor v. Higgins*, 113 N. Y. 511; *Clapp v. Bromaghan*, 9 Cow. 530; *Bogardus v. Trinity Church*, 4 Paige, 178; *Jackson v. Smith*, 13 Johns. 406; *Towne v. Needham*, 3 Paige, 545; *Florence v. Hopkins*, 46 N. Y. 182; *Bradstreet v. Clark*, 12 Wend. 602; *Jackson v. Brink*, 5 Cow. 453.) The conveyance of the premises by Joseph Clary to Martin Koebel and Adam Pforter conveyed the whole premises as by an executor's deed. (*People v. Kaiser*, 28 N. Y. 234; *Bradstreet v. Clark*, 12 Wend. 602; *Hitchcock v. Dundas*, 12 How. [U. S.] 271; *Sage v. Sherman*, 2 N. Y. 417; *Fairchild v. Fairchild*, 64 N. Y. 471.)

MARTIN, J. This action was commenced against Jonathan S. Buell in April, 1893. In March, 1894, Buell died and subsequently the present defendants, who are the heirs and personal representatives of the decedent, were made parties defendant. The purpose of the action was to compel the determination of a claim of title adverse to that of the plaintiff made by the decedent and those succeeding him in interest. The decedent and the defendants, as successors to his interest, claimed to be the owners of an undivided one-half of the premises in question. As the plaintiff was in possession, this action was brought in pursuance of the provisions of section 1638 of the Code of Civil Procedure.

On and prior to February 5, 1819, premises of which those in question formed a part were owned by one Elijah Holt. They were in what was then Niagara and now is Erie county. On that day he gave a warranty deed of the premises to one Williams Holt, which was acknowledged and recorded on the sixth day of the same month. The consideration named therein was \$1,887.50.

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On the day the foregoing deed was given, one Reuben B. Heacock recovered a judgment in the Court of Common Pleas for Niagara county against Elijah Holt for three hundred and ten dollars. An execution was issued thereon to the sheriff of that county, which was tested June 5, 1819, four months after the judgment was recovered. A sheriff's deed was given April 12, 1820, in which it is recited that by virtue of that execution and another issued on a judgment against Elijah Holt and one Cotton, tested February 12, 1820, he seized the land then owned by Elijah Holt, and, for the sum of three hundred and twenty dollars, sold it to Asa Rice and Joseph Clary, "said Asa and Joseph being executors of John Dill of Otsego county, deceased." This deed purported to grant to Rice and Clary, who were partners in business and executors of the will of John Dill, all the estate, title and interest that Elijah Holt had in the premises on the fifth day of February, 1819. Asa Rice died in 1823, leaving three children, John D. Rice, who was then of the age of eleven years; Norman Clary Rice, aged five years, and Henry Rice, aged three years. John D. Rice died in 1855 without issue, leaving a widow who died soon after, and leaving Norman Rice and Henry Rice his only heirs at law him surviving, who were also the only surviving heirs of Asa Rice, deceased.

On September 13, 1828, Joseph Clary made, executed and acknowledged a warranty deed of said premises to Martin Koebel and Adam Pforter. The consideration named was thirteen hundred and forty dollars. This deed was recorded November 5, 1828. On October 17, 1829, Williams Holt, in consideration of two hundred dollars, by warranty deed, conveyed the premises formerly owned by Elijah Holt to Joseph Clary. The deed was recorded upon the same day.

On December 31, 1828, Adam Pforter executed and acknowledged a warranty deed of one undivided half of said premises to Martin Koebel, which was recorded March 14, 1868. The consideration expressed therein was sixteen hundred dollars. On August 1, 1864, Martin Koebel made, executed and acknowledged a deed to Philip Koebel of the whole

of said farm or premises, for the consideration of twenty-five hundred dollars. This deed was recorded February 27, 1868.

September 7, 1868, Philip Koebel made, executed and acknowledged a warranty deed of the whole of said premises or farm to Elam R. Jewett, which was recorded September 10, 1868, the consideration expressed being six thousand dollars. On February 19, 1886, Elam R. Jewett made, executed and acknowledged a deed to the Parkside Land and Improvement Company, which was recorded March 16, 1886. This deed conveyed the whole of said farm, including the lands in question, and expressed a consideration of \$44,148.00. On May 20, 1892, the Parkside Land and Improvement Company made, executed and acknowledged a deed to the plaintiff, which was recorded May 24, 1892. The consideration expressed was the sum of one dollar. This deed conveyed the premises in question and other lands.

On the fourteenth of May, 1892, Henry Rice, as surviving heir of Asa Rice, deceased, made and executed a quitclaim deed of said premises to Jonathan S. Buell, the original defendant in this action, which was recorded on the twenty-fourth of the same month. The consideration expressed in that deed was the sum of one dollar and other valuable considerations. On December 31, 1892, Norman Clary Rice made and executed a quitclaim deed of the whole of the premises to said Jonathan S. Buell for the consideration of one dollar and other valuable considerations, which, according to the record in this case, was recorded on June 24, 1892, six months before it was made. The date of the deed is probably a mistake.

From this epitome of the chain of title under which the parties claim, we find that Elijah Holt was the common source of title. The plaintiff claimed under the deed from Elijah Holt to Williams Holt, the deed from Williams Holt to Joseph Clary, the deed from Joseph Clary to Martin Koebel and Adam Pforter, a deed of an undivided one-half from Pforter to Martin Koebel, a deed from Martin Koebel to Philip Koebel, a deed from Philip Koebel to Jewett, a deed from Jewett



to the Parkside Land and Improvement Company, and a deed from the Parkside Land and Improvement Company to the plaintiff.

On the other hand, the defendants claim that under and by virtue of the sheriff's sale under the judgments against Elijah Holt, to which we have referred, and the deed given in pursuance thereof, the title to the premises passed to Asa Rice and Joseph Clary as tenants in common ; that being such tenants in common a transfer by Clary to Koebel and Pforter conveyed only the title to an undivided one-half of the premises ; that the surviving heirs of Asa Rice were vested with the other undivided one-half, and that, by quitclaim deeds to Jonathan S. Buell from the two remaining heirs, their title to the premises was conveyed to him, and, hence, the present defendants or some of them are the owners in fee of an undivided one-half thereof.

The plaintiff also claims title by virtue of the adverse possession of himself and his grantors. The proof tends to show that as early as 1829 and from then until the title was conveyed to Jewett the grantees of the premises had actual possession of the land, occupied and worked it for farming purposes, raising crops upon it annually, and that after the transfer to Jewett he went into possession thereof and used and occupied it for agricultural purposes, the whole of the land being fenced and under cultivation until November 1, 1885, when the premises were transferred to the land and improvement company ; that they were afterwards occupied by Jewett in the same way under the improvement company until 1887 or 1888, when the company took possession of the property, caused streets to be laid out and graded, cut the land into lots, advertised them for sale, and occupied it in that way until May, 1892, when the premises in question were conveyed to the plaintiff, who has occupied them since that time. The proof discloses quite clearly that the lot in question was in the exclusive possession of the plaintiff and his grantors for more than fifty years before the commencement of this action, and that such possession was under a claimed right of ownership,

was open, visible, notorious and hostile to any other claim. The evidence bearing upon the possession and the manner in which the premises were occupied was undisputed.

When the evidence closed the defendants moved for the direction of a verdict in their favor. That motion was denied. The court then directed a verdict for the plaintiff, and ordered the defendants' exceptions to be heard in the first instance at the General Term. The defendants excepted to the court's direction and to its refusal to direct a verdict in their favor. Having stood upon their motion for the direction of a verdict in their favor and upon their exceptions, without requesting the submission of any specified questions of fact, they thereby submitted them to the court, and waived their right to go to the jury. Consequently, all the controverted facts and inferences in support of the judgment should be deemed to have been established in the plaintiff's favor, and the decision of the court upon the facts must be given the same effect as if the jury had found a verdict in the plaintiff's favor after the case was submitted to it. (Baylies' Trial Practice, p. 322 *et seq.*; *Trimble v. N. Y. C. & H. R. R. Co.*, 162 N. Y. 84, 91.) It follows that the defendants' appeal cannot be sustained unless they were entitled, as a matter of law, to the direction of a verdict in their favor. Hence, the question is whether, under the evidence, the defendants have either established title in themselves, or the plaintiff failed to show that he had title to the premises in question under any view of the evidence which might be taken by the trial court. These questions will be examined in the order in which they are stated.

*First*, then, have the defendants established a legal title to the premises superior to that of the plaintiff? At the threshold the question arises whether Rice and Clary, by their purchase under the sale upon the execution against Elijah Holt, obtained a title paramount to that acquired by Williams Holt under the deed of Elijah Holt, made on the fifth of February, 1819. If we assume that the evidence was sufficient to show a judgment, an execution issued to the sheriff June 5, 1819, a

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sale upon such execution, and that a sheriff's deed was given in pursuance of such sale on April 12, 1820, still another point must be determined, which is whether, in view of the fact that the judgment was not docketed at the time of the conveyance to Williams Holt, it constituted a valid lien which was prior or superior to the title obtained by virtue of that deed. If it did not, then it seems clear that as there was no lien upon the premises the deed was valid and passed the title, unless the grantee had notice of such judgment. This sale was made in 1819. Under the statute as it then stood, the docketing of a judgment was not essential to the sale of land by virtue of an execution issued upon it, but the statute expressly provided that no judgment which was not docketed should affect any lands or tenements as to purchasers or mortgagees. (1 Rev. Laws, 1813, ch. 50, §§ 1, 3.) It was held in *Buchan v. Sumner* (2 Barb. Ch. 165) that under this statute no judgment would affect any lands, tenements, real estate or chattels real, or have any preference until the record thereof had been filed and docketed. While in *King v. Harris* (34 N. Y. 330, 332) it was said that the correctness of that decision was not free from doubt, upon principle, as against subsequent liens which did not stand in the *bona fide* relation of having parted with a consideration, still, the integrity of the decision in the *Buchan* case was in no way questioned where the relation of the subsequent lien or title was *bona fide* and the lienor or grantee had parted with a consideration for the property conveyed.

The deed was given and the judgment entered upon the same day, so that it is difficult, if not impossible, to now determine which was first entered or executed. If, however, it be assumed that the Heacock judgment was entered before the delivery of the deed by Elijah Holt to Williams Holt, still, as the judgment was not docketed, it did not affect the Williams Holt title unless he had notice of the judgment. In the deed from Elijah Holt to Williams Holt, the consideration expressed was \$1,887.50, which was *prima facie* evidence that the purchase was for a valuable consideration. (*Wood v. Chapin*, 13

N. Y. 509; *Ring v. Steele*, 4 Abb. Ct. App. Dec. 68; *Page v. Waring*, 76 N. Y. 463, 469.) There is no evidence which would justify the conclusion that Williams Holt had any notice of the judgment against Elijah Holt when he took his conveyance, and no such fact can be presumed. Actual notice of the judgment, or perhaps knowledge or notice of facts which would put a prudent man upon inquiry, would impeach the good faith of such purchaser. But to justify that result, there must be proof of actual notice or circumstances tending to show such prior right. Actual notice of itself would impeach the subsequent conveyance, and proof of circumstances short of actual notice which would put a prudent man upon inquiry might authorize a court or jury to infer and find actual notice. But there is no proof in the record upon which it could be properly found that Williams Holt had any notice of the judgment, actual or constructive, when he took his conveyance.

The appellants further contend that as Asa Rice and Joseph Clary were tenants in common under a title obtained by virtue of the sheriff's sale and a deed given in pursuance thereof, Clary could not purchase the outstanding title of Williams Holt for his own benefit, but that as between him and Asa Rice the purchase inured to the benefit of Rice as well as himself, Rice being chargeable with his proportionate share of the expense. The answer to this proposition is that neither Rice nor Clary, nor both together, obtained any title under the sheriff's deed, as the title vested in Williams Holt before such sale as against them under and by virtue of the deed from Elijah Holt, and, consequently, they never occupied the relation of tenants in common. Again, if the relation of tenants in common ever existed between Clary and Rice, it had ceased at the time Clary took title of Williams Holt, as Clary had previously transferred to Koebel and Pforter all the right, title and interest he had in the premises, so that at that time he had no title either as tenant in common or otherwise. The purpose of Clary's purchase from Holt is quite obvious. He had given a deed of the premises with a warranty of title,

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and, hence, was required to make it good. To do so he subsequently purchased the title of Williams Holt, thus protecting himself against liability under his warranty. While it must be admitted as an abstract proposition of law that the possession of one tenant in common is, in a legal sense, that of all until he assumes a position hostile to the relation of his cotenant and to have an exclusive right to the property, and that he cannot convey their interests in it, yet, for the reasons already suggested, that principle, as well as the principle upon which it is claimed that Clary's purchase inured to the benefit of Asa Rice, has no application here.

Moreover, if one tenant in common assumes to sell and convey the entire estate, apparently doing so, and his grantee assumes to take it and goes into possession, the possession thus taken and held by him may be treated as an ouster of the cotenants and constitute adverse possession. (*Clapp v. Bromagham*, 9 Cow. 530; *Bogardus v. Trinity Church*, 4 Paige, 178; *Town v. Needham*, 3 Paige, 545; *Florence v. Hopkins*, 46 N. Y. 182, 186; *Baker v. Oakwood*, 123 N. Y. 16.) The evidence in this case warranted the conclusion that the premises in question were in the actual possession of the grantees under the Williams Holt deed and other subsequent deeds purporting to convey the entire estate, and that they took their conveyances as grants having that effect and held possession under them, claiming title of the whole for more than fifty years continuously and for more than forty years since the youngest heir of Asa Rice reached his majority. We think it is clear, for the reasons previously stated as well as that of the adverse possession of the plaintiff and his grantors, that the children and heirs of Asa Rice were effectually concluded from asserting a claim to any estate in the premises in question, and, hence, that their deed to Jonathan S. Buell was ineffectual to support any claim thereto either in his behalf or that of the defendants who succeeded to his title or estate. If it be said that there were questions of fact arising upon the evidence as to adverse possession or notice in Williams Holt of the judgment against Elijah Holt, still, since

those questions were submitted to the trial court, its disposition of them must be regarded as final.

Whether the sheriff's deed purported to convey the premises to Asa Rice and Joseph Clary as executors of John Dill, or as tenants in common in their own right, under our view of the case, is of no consequence, because, as we have already seen, they took no title under that deed as against the title under which the plaintiff claims. If we are correct in our conclusion that the title to the property in question passed by the deed from Elijah Holt to Williams Holt, the legal title became vested in him and the occupation of the premises by his grantees of that title is presumed to have been under it and not under the grantees in the sheriff's deed.

We think no reversible error was committed by the court in refusing to receive in evidence a certified copy of the inventory of the estate of John Dill filed by Asa Rice and Joseph Clary as executors, as the question to which that evidence was directed is immaterial to the proper disposition of the case.

The appellants' claim that under their pleadings they were entitled to submit to the jury the question whether the possession of the plaintiff and his grantors was adverse, is not before us, as they made no request that it should be thus submitted.

If it be said that there is no evidence of a sufficient delivery of any of the various deeds under which the plaintiff claims title, the answer is that they are all recorded as was shown by certified copies of their record, which raises the presumption that they were recorded by the grantee, and the proof of that fact is *prima facie* and presumptive evidence of delivery. (*Wilsey v. Dennis*, 44 Barb. 354; *Devlin on Deeds*, § 292; *Lawrence v. Farley*, 24 Hun, 293; *Munoz v. Wilson*, 111 N. Y. 295, 304.)

While the defendants set up in the answer that the deed from Elijah Holt to Williams Holt was void for fraud, no sufficient evidence was offered to support that allegation, and surely there was none which would justify this court in

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holding as a matter of law that it was fraudulent. If there was any evidence upon the subject, circumstantial or otherwise, that question has been disposed of by the trial court.

The judgment should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN and LANDON, JJ., concur.

Judgment affirmed. \_\_\_\_\_

THOMAS C. STEWART, as Administrator of ANDREW C.

STEWART, Deceased, Respondent, v. JOHN W. FERGUSON, Appellant.

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e173	*536
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77	AD*365

1. NEGLIGENCE — FALL OF SCAFFOLD — MASTER'S LIABILITY TO SERVANT. Where a scaffold provided by the master for a servant's use falls, and no other cause of the fall is ascertained except as inferred from the fall itself, the fall is *prima facie* evidence of the negligence of the master in an action by the servant to recover damages received in consequence thereof.

2. LIABILITY OF MASTER UNDER LABOR LAW. Where the cause of the fall is otherwise ascertained, sections 18 and 19 of the Labor Law (L. 1897, ch. 415) enlarge the duty of the master, and extend it to responsibility for the safety of the scaffold itself, and thus for the want of care in the details of its construction.

*Stewart v. Ferguson*, 52 App. Div. 317, affirmed.

(Argued October 11, 1900; decided November 20, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 14, 1900, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

The action was brought to recover damages for alleged negligence causing the death of Andrew C. Stewart, the plaintiff's intestate, on November 23, 1897. Stewart was in the employ of defendant, and while engaged in laying brick in the wall of a building which the defendant was erecting in Long Island City, the scaffold upon which he was standing, which the defendant had caused to be erected for the purpose, fell, and caused his death.

*John Vernon Bouvier, Jr.*, for appellant. The happening of the accident created no presumption of negligence on the

part of the defendant, and the court's refusal so to charge was error. (*Kearney v. L., etc., R. R. Co.*, L. R. [5 Q. B.] 411; *Armstrong v. M. S. Ry. Co.*, 36 App. Div. 526; *Weidmer v. N. Y. E. R. R. Co.*, 114 N. Y. 462; *Welsh v. Murray*, 2 App. Div. 205; *Allen v. Banks*, 7 App. Div. 405; *Losee v. Buchanan*, 51 N. Y. 476; *Olive v. W. M. Co.*, 103 N. Y. 292; *Sheldon v. H. R. R. Co.*, 29 Barb. 226; *Kaveny v. City of Troy*, 108 N. Y. 571; *Curren v. Warren*, 36 N. Y. 153.)

*Edward P. Lyon* for respondent. The court correctly charged the jury that the unexplained fall of the scaffold was *prima facie* proof of negligence. (*Green v. Banta*, 16 J. & S. 156; *Caldwell v. N. Y. S. Co.*, 47 N. Y. 282; *Mullen v. St. John*, 57 N. Y. 571; *Solarz v. M. R. Co.*, 8 Misc. Rep. 656; *Kimmer v. Weber*, 151 N. Y. 417.)

LANDON, J. The only question of law presented for our review by the exceptions arises upon the refusal of the trial court to charge as requested by the defendant. There was evidence tending to show how the scaffold was constructed, but not tending to show any particular structural weakness. There was no evidence tending to prove the cause of the fall of the scaffold other than the fall itself. The trial court instructed the jury that the falling of the scaffold raised a presumption of the negligence of the defendant in its construction, and he refused to charge that the happening of the accident created no presumption of negligence on the part of the defendant. The charge was not excepted to, but the refusal was; but both charge and refusal may be considered, because the charge made the refusal more pointed and impressive.

Before the passage of the Labor Law (Chap. 415, Laws of 1897) it had been held that the falling of a scaffold without any apparent cause was *prima facie* evidence of negligence on the part of the person bound to provide it. (*Green v. Banta*, 16 J. & S. 156; affirmed, 97 N. Y. 627; *Solarz v. Man. Ry. Co.*, 8 Misc. Rep. 656; affirmed on appeal, 11



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Misc. Rep. 715, and 155 N. Y. 645.) These cases proceeded upon the theory that, if the scaffold had been properly constructed, in the absence of other ascertained cause of its fall, negligence in its construction or maintenance might be presumed. In *Butler v. Townsend* (126 N. Y. 105) the negligent act which caused the fall of the scaffold was ascertained and the question in controversy was whether it was the negligence of the master or of his servants. The court held that the scaffold was not a place in which to perform labor, but an appliance for use in its performance, and, therefore, the master's duty was that which he owed his servants in respect of appliances and not of places, and that his duty to his servants was performed in respect of the scaffold by furnishing proper materials for its construction and competent workmen to construct it, and that he could commit the details of its construction to such servants, and that their negligence in the execution of these details resulting in an injury to a fellow-servant was not the master's negligence. In *Kimmer v. Weber* (151 N. Y. 417) a scaffold fell and the same rule was applied.

Assuming the law to be as stated in the two classes of cases, the case before us falls within the class in which no other cause of the fall of the scaffold was ascertained except as inferred from the fall itself and not within the class in which it was otherwise ascertained. But, if within the latter class, then we think sections 18 and 19 of the Labor Law enlarge the duty of the master or employer and extend it to responsibility for the safety of the scaffold itself and thus for the want of care in the details of its construction.

These sections provide :

"Section 18. Scaffolding for use of employees. A person employing or directing another to perform labor of any kind in the erection, repairing, altering or painting of a house, building or structure shall not furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders or other mechanical contrivances which are unsafe, unsuitable or improper, and which are not so constructed, placed and operated as to give proper

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Opinion of the Court, per LONDON, J. [Vol. 164, N. Y. Rep.]

protection to the life and limb of a person so employed or engaged."

"Section 19. All swinging and stationary scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon, when in use," etc.

This section differs from section 1, chapter 314, Laws of 1885, in this respect: That section provides for the punishment of knowingly or negligently doing the acts mentioned in this section. This section omits the words "knowingly or negligently," and declares that the acts shall not be done. The plaintiff would have to prove either knowledge or actual negligence under the earlier act, and the defendant, no doubt, could invoke for his protection upon the charge of negligence the distinction between his negligence and that of his servants as laid down in the case of *Butler v. Townsend (supra)*. This probably explains why the earlier act was not noticed in *Butler v. Townsend*, *Kimmer v. Weber (supra)*, and in the cases in the Appellate Division cited by the appellant. Section 18 is a positive prohibition laid upon the master without exception upon account of his ignorance or the carelessness of his servants. The evidence tended to show that this scaffold was not overloaded, but was bearing the weight usually required in the performance of the labor for which it was an appliance. *Prima facie* it was so constructed as to bear less than one-fourth the weight required by section 19. Its fall, in the absence of evidence of other producing cause, points to the omission of the duty enjoined by the statute upon the defendant to the plaintiff in its construction, and points to it with that reasonable certainty which usually tends to produce conviction in the mind in tracing events back to their causes, and thus creates a presumption. It is circumstantial evidence, and if it does convince the jury, it justifies their verdict.

The judgment should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN and VANN, JJ., concur; HAIGHT, J., concurs in result.

Judgment affirmed.

# MEMORANDA

OF

*DECISIONS RENDERED DURING THE PERIOD EMBRACED IN  
THIS VOLUME.*

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AMOS M. BUKER et al., in their own Behalf, etc., Appellants,  
v. THE LEIGHTON LEA ASSOCIATION, Respondent.

*Buker v. Leighton Lea Association*, 18 App. Div. 548, reversed.  
(Argued May 18, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 12, 1897, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at an Equity Term.

*George D. Reed* for appellants.

*William F. Cogswell* for respondent.

Judgment reversed and new trial granted, costs to abide the event; no opinion.

PARKER, Ch. J., O'BRIEN, MARTIN and LANDON, JJ., concur in reversal upon opinion of FOLLETT, J., in court below. O'BRIEN and LANDON, JJ., think that the evidence does not support the finding that the first articles of association of the defendant were amended, and therefore that the acts of the defendant, under the assumed amendment, purporting to forfeit the stock of the plaintiffs were invalid, and that equity requires defendant to reimburse the plaintiffs the amount of their respective payments upon the shares of stock subscribed for by them.

GRAY, J., dissents; HAIGHT, J., not voting, and WERNER, J., not sitting.

JACOB HOFFMAN, Respondent, *v.* THE SOLVAY PROCESS COMPANY, Appellant.

*Hoffman v. The Solvay Process Company*, 29 App. Div. 624, affirmed.  
(Argued June 11, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 14, 1898, affirming a judgment in favor of plaintiff entered upon a verdict.

*Louis L. Waters* and *E. J. Page* for appellant.

*P. J. Ryan* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, LONDON and CULLEN, JJ.

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HENRY P. MCGOWN, JR., Respondent, *v.* MARY E. MCGOWN, Appearing and Answering Herein as MARY E. BELL, Appellant.

*McGown v. McGown*, 19 App. Div. 868, affirmed.  
(Argued June 12, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 19, 1897, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

*L. B. Treadwell* and *R. W. Darling* for appellant.

*Charles Blandy* for respondent.

Judgment affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, LONDON and CULLEN, JJ.

DIEDRICH J. BENSEN, Respondent, *v.* THE MANHATTAN RAIL-  
WAY COMPANY et al., Appellants.

*Bensen v. Manhattan R. Co.*, 14 App. Div. 442, affirmed.  
(Argued June 18, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 8, 1897, upon an order reversing a judgment in favor of defendants entered upon a dismissal of the complaint by the court upon the report of a referee.

*Arthur O. Townsend* and *Charles A. Gardiner* for appellants.

*Edwin M. Felt* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, LONDON and CULLEN, JJ.

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BENJEMEN SIRE, Respondent, *v.* J. WESLEY ROSENQUEST et al.,  
Appellants.

*Sire v. Rosenquest*, 28 App. Div. 238, affirmed.  
(Argued June 14, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 21, 1898, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

*Henry Thompson* for appellants.

*George Fielder* and *Albert I. Sire* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, LONDON and CULLEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. GEORGE W. KELLY et al., Respondents, v. GEORGE H. LASHER, as Commissioner of Highways of the Town of Middletown, et al., Appellants.

*People ex rel. Kelly v. Lasher*, 22 App. Div. 630, affirmed.  
(Submitted June 14, 1900; decided October 2, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 3, 1898, affirming an order of a Trial Term directing that a peremptory writ of mandamus issue requiring the defendants, as commissioners of highways, to lay out a highway described therein.

*F. M. Andrus* for appellants.

*U. L. Andrus* for respondents.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN and CULLEN, JJ. Not sitting: LONDON, J.

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DEBORAH L. MANGAM, Appellant, v. THE PRESIDENT AND TRUSTEES OF THE VILLAGE OF SING SING, Respondent.

*Mangam v. Village of Sing Sing*, 26 App. Div. 464, affirmed.  
(Argued June 14, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 16, 1898, affirming a judgment in favor of defendant entered upon a verdict, and an order denying a motion for a new trial.

*Herman Aaron* for appellant.

*Smith Lent* and *John Gibney* for respondent.

Judgment affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN and LONDON, JJ. Not sitting: CULLEN, J.

THOMAS MAHONEY, Respondent, v. JAMES MCCLOUD et al.,  
Appellants.

*Mahoney v. McCloud*, 27 App. Div. 631, affirmed.  
(Submitted June 15, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 7, 1898, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

*Dean & Horton* for appellants.

*S. D. Halliday* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,  
VANN and CULLEN, JJ. Not sitting: LONDON, J.

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JAMES T. FLEMING. Respondent, v. CLARISSA N. HARRISON,  
Appellant.

*Fleming v. Harrison*, 29 App. Div. 627, affirmed.  
(Submitted June 15, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 14, 1898, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

*Wilson & Cobb* for appellant.

*Hancock, Hogan & Devine* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,  
VANN and CULLEN, JJ. Not sitting: LONDON, J.

MILTON S. ARNOLD, as Surviving Partner of the Firm of M. ARNOLD & COMPANY et al., Appellants, v. THE R. ROTHSCHILD'S SONS COMPANY, Respondent.

*Arnold v. Rothschild's Sons Co.*, 37 App. Div. 564, affirmed.  
(Argued June 18, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 8, 1899, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term, and an order denying a motion for a new trial.

*Herbert R. Limburger* and *Henry L. Scheuerman* for appellants.

*Mark M. Schlesinger* and *Frank C. Avery* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT and WERNER, JJ. Dissenting: VANN and LANDON, JJ. Not voting: CULLEN, J.

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ALEXANDER D. WALES, Appellant, v. SPRING FOREST CEMETERY ASSOCIATION, Respondent, Impleaded with Others.

*Wales v. Spring Forest Cemetery Assn.*, 22 App. Div. 630, affirmed.  
(Argued June 18, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 18, 1897, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

*C. H. Hitchcock* for appellant.

*Edward K. Clark* and *Roger P. Clark* for respondent.

Judgment affirmed, without costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, VANN, CULLEN and WERNER, JJ. Not sitting: LANDON, J.



WILLIAM GORDON, Appellant, *v.* THE KINGS COUNTY ELE-  
VATED RAILWAY COMPANY, Respondent.

*Gordon v. Kings County El. R. Co.*, 23 App. Div. 51, affirmed.  
(Argued June 18, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 15, 1897, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

*Stephen M. Hoye* for appellant.

*Welton C. Percy* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, VANN, LANDON and WERNER, JJ. Not sitting: CULLEN, J.

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OCTAVIUS O. COTTLE et al., as Executors of JOHN J. P. READ,  
Deceased, Appellants, *v.* AUGUST SIMON, Respondent.

*Cottle v. Simon*, 35 App. Div. 632, affirmed.  
(Argued June 18, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 23, 1898, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

*Edmund P. Cottle* for appellants.

*Frederick G. Bagley* and *Simon Fleischmann* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., BARTLETT, VANN, LANDON and WERNER, JJ. Not voting: O'BRIEN and CULLEN, JJ.

SARAH M. DISBROW, Respondent, *v.* GRIFFIN B. DISBROW,  
Appellant, Impleaded with Another.

*Disbrow v. Disbrow*, 31 App. Div. 624, affirmed.  
(Argued June 19, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 18, 1898, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

*Charles A. Decker* and *Jacob F. Miller* for appellant.

*James R. Fancher* for respondent.

*Per Curiam.* We do not concur in the strictures passed upon counsel in the opinion at the Appellate Division, but as we cannot say that there was no evidence to support the findings to the effect that the execution and delivery of the deed were not the voluntary acts of the plaintiff, but was brought about by undue influence exercised on the part of the defendant, who stood in a confidential relation towards her, we are constrained to affirm the judgment.

The judgment should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, VANN, LANDON,  
CULLEN and WERNER, JJ., concur.

Judgment affirmed.

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JOSHUA C. SANDERS, Appellant, *v.* EMILIE RIEDINGER et al.,  
Respondents.

*Sanders v. Riedinger*, 80 App. Div. 277, affirmed.  
(Argued June 19, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 27, 1898, affirming a judgment in favor of defendants entered upon a verdict, and an order denying a motion for a new trial.

*Joshua C. Sanders*, appellant, in person.

*Norman A. Lawlor* for respondents.

Judgment affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, VANN,  
LANDON and WERNER, JJ. Not sitting: CULLEN, J.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*  
JOHN KLINGLER, Appellant.

*People v. Klingler*, 51 App. Div. 618, affirmed.  
(Argued June 20, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 27, 1900, affirming a judgment of the Monroe County Court convicting the defendant of the crimes of burglary in the third degree and of grand larceny in the second degree.

*George D. Forsyth* for appellant.

*Robert Averill* for respondent.

Judgment of conviction affirmed; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, VANN,  
LANDON, CULLEN and WERNER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*  
JAMES D. HALLEN, Appellant.

*People v. Hallen*, 48 App. Div. 39, affirmed.  
(Argued June 21, 1900; decided October 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 9, 1900, affirming a judgment of the Court of General Sessions of the Peace convicting the defendant of the crime of forgery in the first degree.

*I. W. Lansing* and *William North* for appellant.

*Charles E. Le Barbier* for respondent.

Judgment affirmed ; no opinion.

Concur : PARKER, Ch. J., O'BRIEN, BAETLETT, VANN, LONDON, CULLEN and WERNER, JJ.

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LOUIS ROUTENBERG, Appellant, v. MORRIS SCHWEITZER,  
Respondent.

Reported below, 50 App. Div. 218.

(Submitted October 1, 1900; decided October 9, 1900.)

MOTION to prefer an appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, made April 2, 1900, affirming an order of the Appellate Term of that court reversing a decision of the Municipal Court of the city of New York.

The motion was made upon the ground that the appeal is from an order declaring an act of the legislature unconstitutional.

*Ashley, Emley & Rubino* for motion.

No one opposed.

Motion granted.

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MARY F. HANNON, Respondent, v. SIEGEL-COOPER COMPANY,  
Appellant.

Reported below, 52 App. Div. 624.

(Argued October 1, 1900; decided October 9, 1900.)

MOTION to dismiss an appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 15, 1900, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

The motion was made upon the grounds that the order allowing the appeal does not recite that a question of law is involved which ought to be reviewed by the Court of Appeals ; that

no such question is involved; that said order was granted improvidently and without notice to the respondent, and that so much of subdivision 2 of section 191 of the Code of Civil Procedure as authorizes the allowance of an appeal by a judge of the Court of Appeals is unconstitutional.

*Abraham Levy* for motion.

*George Putzel* opposed.

The motion is to vacate allowance of an appeal made *ex parte*, by a judge of this court, in an action to recover damages for personal injuries, from a judgment for the plaintiff unanimously affirmed by the Appellate Division which had refused to certify that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals. The allowance of the appeal is not reviewable; the application for the allowance could be made *ex parte*.

The motion is denied, with ten dollars costs.

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CHAINLESS CYCLE MANUFACTURING COMPANY, Respondent, v.  
THE SECURITY INSURANCE COMPANY OF NEW HAVEN, CON-  
NECTICUT, Appellant.

Reported below, 52 App. Div. 104.

(Argued October 1, 1900; decided October 9, 1900.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 29, 1900, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

The motion was made upon the grounds that the defendant's exceptions are frivolous and that there is no question of law for this court to review.

*Moses Shire* for motion.

*Horace McGuire* opposed.

Motion denied, with ten dollars costs.

THERON C. CRAWFORD, Respondent, *v.* THE MAIL AND EXPRESS  
PUBLISHING COMPANY, Appellant.

(Submitted October 1, 1900; decided October 9, 1900.)

Motion for reargument denied, with ten dollars costs. (See  
163 N. Y. 404.)

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*  
AARON HALL, Appellant.

(Submitted October 1, 1900; decided October 9, 1900.)

MOTION to dismiss appeal upon the ground that the appel-  
lant had failed to serve the printed papers required by the  
rules of this court.

*Charles E. Le Barbier* for motion.

*Abraham Levy* opposed.

Motion granted unless the defendant serve his proposed  
case on appeal on or before the first day of November next.

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THE ONONDAGA NATION et al., Appellants, *v.* JOHN BOYD  
THACHER, Respondent.

Reported below, 53 App. Div. 561.

(Submitted October 1, 1900; decided October 9, 1900.)

MOTION to advance and to correct the record on an  
appeal from a judgment of the Appellate Division of the  
Supreme Court in the fourth judicial department, entered  
August 7, 1900, affirming a judgment in favor of defendant  
entered upon a decision of the court at a Trial Term.

The motion to advance was made upon the ground that the  
University of the State of New York was a party plaintiff and  
it being one of the departments of the state, the case was  
entitled to preference. The motion to correct the return was  
made upon the ground that counsel for appellants had not

consented to the filing of a certain order which had been made part of the record.

*Edward Winslow Paige* for motion.

*John A. Delehanty* opposed.

Motion to advance denied, without costs.

Motion to correct record denied, without costs.

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CARRIE MYHILL, Respondent, *v.* HANNAH W. BOGARDUS, as Administratrix of EDGAR Z. PELLIS, Deceased, Appellant.

Reported below, 19 App. Div. 628.

(Argued October 1, 1900; decided October 9, 1900.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 24, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

The motion was made upon the ground that the decision of the Appellate Division was unanimous; that an appeal has not been allowed by the Appellate Division or by a judge of this court; that the action was for a personal injury, and that this court has no jurisdiction to hear the appeal.

*S. E. Filkins* for motion.

*John G. Milburn* and *Leon M. Sherwood* opposed.

Motion denied, with ten dollars costs.

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CHARLES WELDE, Respondent, *v.* THE NEW YORK AND HARLEM RAILROAD COMPANY et al., Appellants, Impleaded with Another.

Reported below, 53 App. Div. 637.

(Argued October 1, 1900; decided October 9, 1900.)

MOTION to prefer an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial depart-

ment, entered July 26, 1900, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The motion was made upon the grounds that there are many cases pending against the defendants in which similar questions are involved, and that an early decision of this appeal would prevent much litigation and promote the ends of justice.

*Thomas P. Wickes* for motion.

No one opposed.

Motion denied, without costs.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. FRANK A. McSHANE, Appellant, v. JAMES J. HAGEN, Warden of the City Prison in the County of New York, et al., Defendants.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent.

*People ex rel. McShane v. Hagen*, 48 App. Div. 208, affirmed.

(Argued October 1, 1900; decided October 16, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered March 2, 1900, reversing an order of Special Term sustaining writs of habeas corpus and certiorari and discharging relator from the custody of the warden of the city prison in the county of New York, dismissing such writs and remanding the relator to the custody of said warden.

*Nelson Smith* for appellant.

*John H. Hammond* for respondent.

Order affirmed, without costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LONDON, JJ.



In the Matter of the Accounting of STEPHEN N. SIMONSON, as  
Executor of JOHN G. SMITH, Deceased, Appellant.

WILLIAM M. K. OLCOTT, Respondent.

*Matter of Simonson*, 51 App. Div. 841, appeal dismissed.  
(Argued October 1, 1900; decided October 18, 1900.)

APPEAL from an order of the Appellate Division of the  
Supreme Court in the first judicial department, made May 18,  
1900, affirming an order of the Surrogate's Court of New  
York county adjudging Stephen N. Simonson guilty of con-  
tempt of court.

*Benjamin Franklin* and *E. R. Thompson* for appellant.

*T. B. Chancellor* and *Abraham Gruber* for respondent.

Appeal dismissed, with costs, on authority of *Jewelers'  
Mercantile Agency v. Rothschild* (155 N. Y. 255) and *Ray v.  
N. Y. Bay Extension R. R. Co.* (155 N. Y. 102); no opinion.

Concur: PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN and  
VANN, JJ. Dissenting: O'BRIEN and LANDON, JJ.

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In the Matter of the Accounting of DWIGHT H. OLNSTEAD, as  
Trustee of NOAH T. PIKE, Deceased, Appellant.

NOAH W. PIKE et al., Respondents.

*Matter of Olmstead*, 52 App. Div. 515, affirmed.  
(Argued October 1, 1900; decided October 18, 1900.)

APPEAL from an order of the Appellate Division of the  
Supreme Court in the first judicial department, made June 22,  
1900, modifying and affirming, as modified, a decree of the Sur-  
rogate's Court of the county of New York, passing the accounts  
of Dwight H. Olmstead, as trustee of Noah T. Pike, deceased.

*Charles D. Ridgway* for appellant.

*Henry H. Man* for respondents.

Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,  
MARTIN, VANN and LANDON, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE TERMINAL RAILWAY OF BUFFALO et al., Appellants, v. THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NEW YORK et al., Respondents.

*People ex rel. Terminal R. Co. v. R. R. Comrs.*, 53 App. Div. 61, affirmed. (Argued October 1, 1900; decided October 16, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered July 6, 1900, confirming a determination of the Board of Railroad Commissioners granting to the Lehigh and Lake Erie Railroad Company a certificate that public convenience and a necessity require the construction of that company's proposed railroad.

*Ira A. Place* and *Samuel E. Williamson* for appellants.

*Wilson S. Bissell* and *Frank H. Platt* for respondents.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LONDON, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. PATRICK O'BRIEN, Appellant, v. JOHN J. SCANNELL, as Fire Commissioner of the City of New York, Respondent.

*People ex rel. O'Brien v. Scannell*, 53 App. Div. 161, affirmed. (Argued October 2, 1900; decided October 16, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, made July 17, 1900, affirming an order of Special Term denying a motion for a writ of mandamus commanding the defendant to reinstate the relator in the position of foreman in the fire department of the city of New York.

*Samuel H. Ordway* for appellant.

*John Whalen, Corporation Counsel* (*Theodore Connolly* of counsel), for respondent.

Order affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., O'BRIEN, HAIGHT, MARTIN, VANN and LONDON, JJ. Dissenting: BARTLETT, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. PATRICK J. McCARTHY, Appellant, v. JOHN L. SHEA, Commissioner of Bridges of the City of New York, et al., Respondents.

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*People ex rel. McCarthy v. Shea*, 51 App. Div. 227, affirmed.  
(Argued October 2, 1900; decided October 16, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 1, 1900, affirming a final order of Special Term dismissing an alternative writ of mandamus and denying a motion for a peremptory writ of mandamus commanding the defendants to reinstate the relator in the position of conductor on the New York and Brooklyn bridge.

*Samuel H. Ordway* for appellant.

*John Whalen, Corporation Counsel* (*William J. Carr* of counsel), for respondents.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LONDON, JJ.

In the Matter of the Estate of ISAAC E. HOAGLAND, Deceased.  
HENRY P. ROBINSON, as Executor, etc., Appellant; ELIZABETH M. HOAGLAND et al., Respondents.

*Matter of Hoagland*, 51 App. Div. 847, affirmed.  
(Argued October 2, 1900; decided October 16, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, made May 29, 1900, affirming an order of the Surrogate's Court of Kings county, made under section 2602 of the Code of Civil Procedure, requiring the appellant herein to deposit certain moneys of the estate, then held by him, to the joint credit of the executors of Isaac E. Hoagland, deceased.

*Alexander Thain* for appellant.

*J. Woolsey Shepard* and *Charles W. Dayton* for respondents.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LONDON, JJ.

In the Matter of the Application of **GEORGE L. THOMPSON**, Appellant, for an Order Directing **THE BOARD OF SUPERVISORS OF CHENANGO COUNTY**, Respondent, to Refund the Amount Collected of a Certain Tax, Illegally Assessed and Levied on His Real Property in the Town of Otselic in the Year 1896.

*Matter of Thompson*, 51 App. Div. 623, affirmed.

(Argued October 2, 1900; decided October 16, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered July 6, 1900, affirming an order of the Chenango County Court denying a motion for an order directing the board of supervisors of that county to refund to the petitioner the amount collected from him of a certain tax on his real property in the town of Otselic, illegally and improperly assessed and levied thereon in the year 1896.

*W. W. Thompson* for appellant.

*George W. Ray* for respondent.

Order affirmed, with costs; no opinion.

Concur: **PARKER**, Ch. J., **O'BRIEN**, **BARTLETT**, **HAIGHT**, **MARTIN**, **VANN** and **LANDON**, JJ.

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In the Matter of the Application of **THE DEPARTMENT OF PUBLIC PARKS OF THE CITY OF NEW YORK**, Relative to Acquiring Title to Certain Lands for Public Parks and Parkways, under and pursuant to the Provisions of Chapter 522 of the Laws of 1884.

In the Matter of **THOMAS WILSON**, Parcel 377, Pelham Bay Park.

**AUGUSTUS LAWRENCE**, Appellant; **THE CITY OF NEW YORK**, Respondent.

*Matter of Department of Public Parks*, 52 App. Div. 630, affirmed.

(Argued October 2, 1900; decided October 16, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June

25, 1900, denying a motion for an order modifying the report of the referee in the above-entitled special proceeding and confirming said report.

*George H. Corey* for appellant.

*John Whalen, Corporation Counsel* (*Theodore Connolly* and *Charles D. Olendorf* of counsel), for respondent.

Order affirmed, with costs ; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

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In the Matter of the Application of THE GRADE CROSSING COMMISSIONERS OF THE CITY OF BUFFALO for the Appointment of Commissioners to Ascertain the Compensation to be Paid to the Owners of and Parties Interested in Certain Lands Proposed to be Taken or which may be Injured in the City of Buffalo.

ERIE RAILROAD COMPANY et al., Appellants ; JOHN N. SCATCHERD, Respondent.

*Matter of Grade Crossing Comrs.*, 52 App. Div. 122, affirmed.  
(Argued October 2, 1900; decided October 16, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 25, 1900, affirming an order of Special Term confirming the award made to John N. Scatcherd by the commissioners of appraisal appointed in this proceeding.

*William L. Marcy, Adelbert Moot, Frank Rumsey* and *Louis L. Babcock* for appellants.

*Herbert P. Bissell* for respondent.

Order affirmed, with costs ; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

In the Matter of the Petition of THOMAS F. GILROY, Commissioner of Public Works of the City of New York, for the Appointment of Commissioners of Appraisal under Chapter 490 of the Laws of 1883.

TOWN OF CORTLANDT, Appellant; THE CITY OF NEW YORK, Respondent.

*Matter of Gilroy*, 43 App. Div. 359, affirmed.

(Submitted October 2, 1900; decided October 16, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered October 3, 1899, affirming two orders of Special Term, the first modifying a report of commissioners of appraisal in condemnation proceedings, nullifying and setting aside an award to the town of Cortlandt, the second denying a motion to resettle the first order.

*Frank Manser* for appellant.

*John Whalen, Corporation Counsel* (*Theodore Connolly* and *H. T. Dykman* of counsel), for respondent.

Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

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JOHN J. COOPER, Respondent, v. AMELIA COOPER et al., Respondents.

PETER EAGAN, Appellant.

*Cooper v. Cooper*, 51 App. Div. 595, appeal dismissed.

(Submitted October 2, 1900; decided October 16, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 1, 1900, affirming an order of Special Term modifying a previous order made by that court by reducing the amount of an extra allowance granted to the plaintiff's attorney.

*Franklin Bien* for appellant.

*Louis Cohen* for respondents.

Appeal dismissed, with costs ; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,  
MARTIN, VANN and LONDON, JJ.

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JOHN J. COOPER, Respondent, v. AMELIA COOPER et al.,  
Respondents.

PETER EAGAN, Appellant.

*Cooper v. Cooper*, 51 App. Div. 595, appeal dismissed.  
(Submitted October 2, 1900; decided October 16, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 1, 1900, affirming an order of Special Term directing Peter Eagan, plaintiff's former attorney, to make restitution of \$1,440 of an extra allowance erroneously awarded to him.

*Franklin Bien* for appellant.

*Louis Cohen* for plaintiff, respondent.

Appeal dismissed, with costs ; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,  
MARTIN, VANN and LONDON, JJ.

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In the Matter of the Assignment of JAMES TAYLOR for the  
Benefit of Creditors to STILLMAN F. KNEELAND, Appellant.  
In the Matter of the Claim of DANIEL W. KEEFE, Respondent.

*Matter of Taylor*, 52 App. Div. 684, appeal dismissed.  
(Argued October 2, 1900; decided October 16, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 14, 1900, affirming an order of the Erie County Court, confirming reports of a referee determining that the claim of

Daniel W. Keefe is entitled to preference under the provisions of the General Assignment Act relating to employees.

*B. Frank Dake* for appellant.

*Irving W. Cole* for respondent.

Appeal dismissed, with costs; no opinion.

Concur: PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ. Not voting: O'BRIEN, J.

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THE TRUSTEES OF THE SUSTENTATION FUND OF THE REFORMED  
EPISCOPAL CHURCH, Respondents, v. RICHARD MULLOWNEY  
et al., Defendants.

HARRY MINTZ, Appellant.

*Trustees v. Mullowney*, 50 App. Div. 465, affirmed.

(Argued October 2, 1900; decided October 16, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered May 1, 1900, modifying and affirming, as modified, an order of Special Term denying the motion of a purchaser at a foreclosure sale to be relieved from his bid and to direct the referee to refund the deposit paid thereon.

A motion to dismiss the appeal herein on the grounds that the relief sought was within the discretion of the court and the order of the Appellate Division final, and that the matter was a "proceeding in the action," and, therefore, not appealable, was submitted prior to the argument of the appeal and denied, without costs.

*John Mulholland* for appellant.

*T. V. W. Anthony* for respondents.

Order affirmed, with costs, and the time for appellant to accept the privilege granted by the Appellate Division extended for twenty days after entry of order hereon; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.



THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE WASHINGTON BUILDING COMPANY et al., Appellants, v. THOMAS L. FEITNER et al., Commissioners of Taxes and Assessments of the City of New York, Respondents.

(Submitted October 1, 1900; decided October 16, 1900.)

Motion for reargument denied, with ten dollars costs. (See 163 N. Y. 384.)

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. DANIEL S. BURR, Appellant, v. THE BOARD OF SUPERVISORS OF BROOME COUNTY, Respondent.

*People ex rel. Burr v. Board of Supervisors*, 47 App. Div. 629, affirmed. (Submitted October 1, 1900; decided October 23, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 9, 1900, confirming the proceedings of the defendant in respect to certain claims against the county of Broome sought to be reviewed on certiorari.

*C. H. Hitchcock* for appellant.

*H. D. Hinman* for respondent.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

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WILLIAM E. ISELIN et al., Respondents, v. PATRICK J. McKEON et al., Defendants.

EDWARD V. THORNALL et al., as Substituted Assignees of PATRICK J. McKEON, Appellants.

*Iselin v. McKeon*, 53 App. Div. 637, appeal dismissed. (Argued October 3, 1900; decided October 23, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 27, 1900, affirming two orders of Special Term denying motions

of the appellants herein to be substituted as defendants in place of James D. Squires, deceased.

*Clarence E. Thornall* for appellants.

*Emanuel Blumenstiel* for respondents.

Appeal dismissed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

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NATHANIEL ALTMAYER et al., Respondents, v. PATRICK J. McKEON et al., Defendants.

EDWARD V. THORNALL et al., as Substituted Assignees of PATRICK J. McKEON, Appellants.

*Altmyer v. McKeon*, 53 App. Div. 637, appeal dismissed. (Argued October 8, 1900; decided October 23, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 27, 1900, affirming two orders of Special Term denying motions of the appellants herein to be substituted as defendants in place of James D. Squires, deceased.

*Clarence E. Thornall* for appellants.

*Emanuel Blumenstiel* for respondents.

Appeal dismissed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOSEPH REITMAN, Appellant, v. THEODORE ROOSEVELT et al., Commissioners, Composing the Board of Police of the Police Department of the City of New York, Respondents.

*People ex rel. Reitman v. Roosevelt*, 42 App. Div. 621, appeal dismissed. (Submitted October 8, 1900; decided October 23, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 27, 1899, dismissing a writ of certiorari to review the proceed-

ings of the defendants in dismissing the relator from the police force of the city of New York.

*Jacob Rouss* for appellant.

*John Whalen, Corporation Counsel (Theodore Connolly and William B. Crowell of counsel)*, for respondents.

Appeal dismissed, with costs, on the authority of *People ex rel. May v. Maynard* (160 N. Y. 453); no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

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WILLIAM T. GARNAR, Respondent, *v.* AMERICAN SICK BENEFIT AND ACCIDENT ASSOCIATION, Appellant.

*Garner v. American S. B. & A. Assn.*, 19 App. Div. 682, affirmed.  
(Argued October 5, 1900; decided October 23, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 13, 1897, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

*C. H. Sturges* for appellant.

*S. W. Rosendale* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ. Not sitting: LANDON, J.

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EDGAR T. GRIFFING, Respondent, *v.* AMERICAN SICK BENEFIT AND ACCIDENT ASSOCIATION, Appellant.

*Griffing v. American S. B. & A. Assn.*, 19 App. Div. 682, affirmed.  
(Argued October 5, 1900; decided October 23, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 13, 1897, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

*C. H. Sturges* for appellant.

*S. W. Rosendale* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,  
MARTIN and VANN, JJ. Not sitting: LONDON, J.

SAMUEL L. WHITE, Respondent, *v.* PETER H. McNULTY,  
Appellant.

*White v. McNulty*, 26 App. Div. 178, affirmed.

(Submitted October 5, 1900; decided October 28, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 3, 1898, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

*Towns & McCrossin* for appellant.

*Albridge C. Smith* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,  
MARTIN, VANN and LONDON, JJ.

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GEORGE H. JACOBS, Respondent, *v.* NORTHWESTERN LIFE  
ASSURANCE COMPANY, Appellant.

*Jacobs v. Northwestern L. Assur. Co.*, 30 App. Div. 285, affirmed.

(Submitted October 5, 1900; decided October 28, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 2, 1898, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

*David Murray* for appellant.

*Charles F. Brown* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,  
MARTIN, VANN and LONDON, JJ.

PHILIP SULLIVAN, Respondent, *v.* RICHARD GOODWIN et al.,  
Appellants, Impleaded with Others.

*Sullivan v. Goodwin*, 30 App. Div. 194, affirmed.  
(Argued October 5, 1900; decided October 23, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 28, 1898, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

*Edward G. Nelson* for appellants.

*Michael Furst* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LONDON, JJ. Not sitting: PARKER, Ch. J.

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ELIZABETH S. VAN BEUREN et al., Respondents, *v.* SARAH  
LAZARUS et al., Appellants.

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*Van Beuren v. Lazarus*, 22 App. Div. 628, modified.  
(Argued May 9, 1900; decided June 12, 1900; motion for reargument submitted October 1, 1900; denied October 23, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 22, 1897, affirming a judgment in favor of plaintiffs entered upon the report of a referee.

*Nelson S. Spencer* for appellants.

*William Mitchell* for respondents.

The judgment of the Appellate Division reversing the first judgment of the Special Term reversed, the subsequent proceedings and judgment set aside and the said judgment of the Special Term affirmed, with costs to the defendants of all the proceedings in all courts, unless the plaintiffs stipulate to

modify the judgment appealed from so as to direct that the plaintiffs pay to the defendants \$13,600, with interest thereon from March 1, 1897, with costs to the defendants in all courts. If they shall so stipulate, then the judgment appealed from is modified in accordance with such stipulation, and as so modified affirmed upon opinion in *Van Beuren v. Wotherspoon* (164 N. Y. 368).

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

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THE AULTMAN & TAYLOR COMPANY, Appellant, v. FREDERICK J. SYME et al., Respondents.

(Submitted October 1, 1900; decided October 28, 1900.)

Motion to amend remittitur denied, with ten dollars costs. (See 163 N. Y. 54.)

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ANDREAS W. KETCHAM et al., Appellants, v. HENRY NEWMAN et al., Respondents.

*Ketcham v. Newman*, 42 App. Div. 621, appeal dismissed.

(Submitted October 15, 1900; decided October 28, 1900.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered September 6, 1899, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at Special Term.

The motion was made upon the ground that the appeal was not taken within one year after the final judgment was entered, and it should, therefore, be dismissed under section 1325 of the Code of Civil Procedure.

*Gordon M. Buck* for motion.

No one opposed.

Motion granted and appeal dismissed, with costs.

DAUPHINE STEINHARDT et al., as Executors of MORRIS STEINHARDT, Deceased, Appellants, v. JOHN O. BAKER, Respondent.

(Submitted October 1, 1900; decided October 28, 1900.)

Motion for reargument denied, with ten dollars costs. (See 163 N. Y. 410.)

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ELIZABETH S. VAN BEUREN et al., Respondents, v. FRANCES A. WOTHERSPOON et al., Appellants.

(Submitted October 1, 1900; decided October 28, 1900.)

Motion for reargument denied, with ten dollars costs. (See 164 N. Y. 368.)

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ELIZABETH S. VAN BEUREN et al., Respondents, v. SARAH LAZARUS et al., Appellants.

(Submitted October 1, 1900; decided October 28, 1900.)

Motion for reargument denied, with ten dollars costs. (See 164 N. Y. 583.)

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THE ULSTER COUNTY SAVINGS INSTITUTION, Appellant, v. VIRGINIA E. OSTRANDER, as Executrix of JAMES E. OSTRANDER, Deceased, et al., Respondents.

(Submitted October 1, 1900; decided October 28, 1900.)

Motion for reargument denied, with ten dollars costs. (See 163 N. Y. 430.)

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MARY J. MOONEY, Appellant, v. ANASTASIA BYRNE et al., Respondents.

(Submitted October 1, 1900; decided October 28, 1900.)

Motion for reargument denied, with ten dollars costs. (See 163 N. Y. 86.)

THE NATIONAL HARROW COMPANY, Appellant, v. E. BEMENT  
& Sons, Respondent.

(Submitted October 1, 1900; decided October 23, 1900.)

Motion for reargument denied, with ten dollars costs. (See  
163 N. Y. 505.)

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In the Matter of the Petition of GEORGE E. CHASE, Respond-  
ent, to Cancel Liquor Tax Certificate No. 18,745, Granted to  
THOMAS A. PEREW, Appellant.

*Matter of Chase*, 50 App. Div. 622, affirmed.

(Argued October 3, 1900; decided October 26, 1900.)

APPEAL from an order of the Appellate Division of the  
Supreme Court in the fourth judicial department, entered  
April 2, 1900, affirming an order of Special Term revoking,  
canceling and directing the surrender of a liquor tax certifi-  
cate granted to Thomas A. Perew.

*William S. Jackson* for appellant.

*W. B. Simson* for respondent.

Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,  
MARTIN, VANN and LANDON, JJ.

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MARY DOCHTERMANN, Respondent, v. THE BROOKLYN HEIGHTS  
RAILROAD COMPANY, Appellant.

*Dochtermann v. Brooklyn Heights R. R. Co.*, 32 App. Div. 13, affirmed.  
(Argued October 8, 1900; decided October 26, 1900.)

APPEAL from an order of the Appellate Division of the  
Supreme Court in the second judicial department, entered  
June 24, 1898, reversing an order of the Trial Term setting  
aside a verdict in favor of plaintiff, and awarding a new trial,  
and directing judgment in favor of plaintiff upon the verdict.



*Thomas L. Hughes* for appellant.

*S. S. Whitehouse* for respondent.

Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,  
MARTIN, VANN and LANDON, JJ.

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ARTHUR SCHROEDER, Respondent, *v.* COATESVILLE ROLLING  
MILL COMPANY et al., Appellants.

*Schroeder v. Coatesville R. M. Co.*, 31 App. Div. 295, affirmed.  
(Argued October 8, 1900; decided October 26, 1900.)

APPEAL from a judgment of the Appellate Division of the  
Supreme Court in the first judicial department, entered July  
11, 1898, affirming a judgment in favor of plaintiff entered  
upon a verdict, and an order denying a motion for a new trial.

*John J. Delany* for appellants.

*Henry W. Showers* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,  
MARTIN, VANN and LANDON, JJ.

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JAMES W. CORCORAN, Respondent, *v.* THE NEW YORK CENTRAL  
AND HUDSON RIVER RAILROAD COMPANY, Appellant.

*Corcoran v. N. Y. C. & H. R. R. Co.*, 25 App. Div. 479, affirmed.  
(Submitted October 9, 1900; decided October 26, 1900.)

APPEAL from a judgment of the Appellate Division of the  
Supreme Court in the fourth judicial department, entered  
March 30, 1898, affirming a judgment in favor of plaintiff  
entered upon a verdict directed by the court, and an order  
denying a motion for a new trial.

*Purcell, Walker & Burns* for appellant.

*John N. Carlisle* for respondent.

Judgment affirmed, with costs. The question whether the statute is violative of the provisions of the Constitution has not been considered for the reason that the question was not raised in the courts below (*Purdy v. Erie R. R. Co.*, 162 N. Y. 42); no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LONDON, JJ.

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ROBERT W. FIRTH, Respondent, v. CATHARINE A. C. G.  
REHFELDT, Appellant.

*Firth v. Rehfeldt*, 30 App. Div. 326, affirmed.  
(Argued October 9, 1900; decided October 26, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 26, 1898, affirming a judgment in favor of plaintiff entered upon the report of a referee.

*Edmund Luis Mooney and Frederick A. Card* for appellant.

*James P. Philip* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LONDON, JJ.

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MILLARD F. POWERS et al., Respondents, v. ANDREW McLEAN,  
Appellant.

*Powers v. McLean*, 14 App. Div. 92, affirmed.  
(Argued October 10, 1900; decided October 26, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 16, 1897, reversing a judgment in favor of defendant entered upon the report of a referee, and granting a new trial.

*Robert A. B. Dayton* for appellant.

*Robert L. Harrison* for respondents.

Order affirmed and judgment absolute ordered for plaintiff on the stipulation, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LONDON, JJ.

**THE UNION STOVE WORKS, Respondent, v. FREDERICK  
KLINGMAN et al., Appellants.**

*Union Stove Works v. Klingman*, 20 App. Div. 449, affirmed.  
(Submitted October 10, 1900; decided October 26, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered August 16, 1897, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

*George Bell* and *Benjamin Patterson* for appellants.

*Frank M. Avery* for respondent.

Judgment affirmed, with costs, on opinion below.

Concur: O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LONDON, JJ. Not sitting: PARKER, Ch. J.

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**JOSEPH KELLY, Appellant, v. THE CONNECTICUT MUTUAL LIFE  
INSURANCE COMPANY, Respondent.**

*Kelly v. Connecticut Mut. L. Ins. Co.*, 17 App. Div. 624, affirmed.  
(Argued October 10, 1900; decided October 30, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered September 27, 1897, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

*P. C. Dugan* and *J. Newton Fiero* for appellant.

*Samuel S. Hatt* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ. Not voting: PARKER, Ch. J. Not sitting: LONDON, J.

HENRY MILLER, Respondent, *v.* ALPHONSE V. BENOIT,  
Appellant.

*Miller v. Benoit*, 29 App. Div. 252, affirmed.  
(Argued October 10, 1900; decided October 30, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 17, 1898, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

*P. Q. Eckerson* for appellant.

*John A. Mapes* for respondent.

Judgment affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,  
MARTIN, VANN and LONDON, JJ.

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TRUMAN C. WHITE, Respondent, *v.* HUNTINGTON R. KENYON,  
Appellant.

*White v. Kenyon*, 33 App. Div. 623, affirmed.  
(Argued October 10, 1900; decided October 30, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered August 11, 1898, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term, a jury having been waived.

*Edward C. Randall* for appellant.

*Eugene M. Bartlett* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,  
MARTIN, VANN and LONDON, JJ.

ALEXANDER DOYLE, Appellant, v. WHITELOW REID,  
Respondent.

*Doyle v. Reid*, 33 App. Div. 681, affirmed.  
(Argued October 15, 1900; decided October 30, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered August 31, 1898, affirming a judgment in favor of defendant entered upon a verdict directed by the court.

*Herbert F. Andrews* for appellant.

*Henry W. Sackett* for respondent.

Judgment affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN,  
CULLEN and WERNER, JJ.

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JOHN M. WARD, Appellant, v. THE CITY OF BROOKLYN,  
Respondent, Impleaded with Others.

164b 591
165 206

*Ward v. City of Brooklyn*, 32 App. Div. 430, affirmed.  
(Argued October 15, 1900; decided October 30, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered August 3, 1898, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at Special Term.

*Sanders Shanks* and *Andrew F. Van Thun, Jr.*, for appellant.

*John Whalen, Corporation Counsel* (*William J. Carr* of counsel), for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN  
and WERNER, JJ. Not sitting: CULLEN, J.

THE GRAVES ELEVATOR COMPANY, Appellant, v. BENJAMIN GATES et al., as Trustees of the UNITED SOCIETY OF BELIEVERS, Called Shakers, Residing in the County of Columbia, Respondents.

*Graves Elevator Co. v. Gates*, 80 App. Div. 621, affirmed.  
(Argued October 17, 1900; decided October 30, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered June 9, 1898, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term.

*Richard T. Greene* for appellant.

*Peter Mitchell* for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, CULLEN and WERNER, JJ. Not voting: VANN, J.

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JAMES L. REYNOLDS, Appellant, v. THE CITY OF MOUNT VERNON, Respondent.

*Reynolds v. City of Mount Vernon*, 26 App. Div. 581, affirmed.  
(Submitted October 17, 1900; decided November 2, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, made March 22, 1898, reversing a judgment in favor of plaintiff entered upon a verdict directed by the court, and an order denying a motion for a new trial, and granting a new trial.

*Isaac N. Mills* for appellant.

*William J. Marshall* for respondent.

Order affirmed and judgment absolute ordered for defendant on the stipulation, with costs; no opinion.

CONCUR: GRAY, MARTIN, VANN and WERNER, JJ. Dissenting: PARKER, Ch. J., and BARTLETT, J. Not sitting: CULLEN, J.

FREDERICK S. MYERS, Respondent, v. THOMAS J. GALLON,  
Appellant.

*Myers v. Gallon*, 85 App. Div. 449, affirmed.

(Submitted October 18, 1900; decided November 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 19, 1898, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

*Matthew Daly* for appellant.

*Hamilton R. Squier* for respondent.

Judgment affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN,  
CULLEN and WERNER, JJ.

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THE CROOKER-WHEELER ELECTRIC COMPANY, Appellant, v.  
THE JOHNS-PRATT COMPANY, Respondent.

*Crocker-Wheeler El. Co. v. Johns-Pratt Co.*, 29 App. Div. 300, affirmed.  
(Argued October 18, 1900; decided November 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 23, 1898, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

*Herbert Noble* and *Howard Hasbrouck* for appellant.

*William A. Jenner* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN,  
CULLEN and WERNER, JJ.

164a	594
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CHARLES A. BROWN et al., Composing the Firm of BROWN & FLEMING, Appellants, v. WILLIAM CODY et al., Composing the Firm of CODY BROTHERS, Respondents.

*Brown v. Cody*, 23 App. Div. 210, affirmed.

(Argued October 18, 1900; decided November 2, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered August 16, 1898, reversing a judgment in favor of plaintiffs entered upon a verdict directed by the court, and an order denying a motion for a new trial, and granting a new trial.

*Frederick E. Anderson* for appellants.

*James W. Ridgway* for respondents.

Order affirmed and judgment absolute ordered for defendants on the stipulation, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN and WERNER, JJ. Not sitting: CULLEN, J.

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Case 2	
169	149

SIMON ROTHSCHILD, Respondent, v. THE RIO GRANDE WESTERN RAILWAY COMPANY, Appellant.

*Rothschild v. Rio Grande W. Ry. Co.*, 17 App. Div. 635, affirmed.

(Argued October 18, 1900; decided November 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 17, 1897, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court, and an order denying a motion for a new trial.

*Roger A. Pryor* for appellant.

*George Hoadly* and *William Strauss* for respondent.

Judgment affirmed, with costs, on opinion of FOLLETT, J. (84 Hun, 103).

Concur: GRAY, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ. Not sitting: PARKER, Ch. J.



SIMON ROTHSCHILD, Respondent, v. THE RIO GRANDE WESTERN  
RAILWAY COMPANY, Appellant.

*Rothschild v. Rio Grande W. Ry. Co.*, 31 App. Div. 630, affirmed.  
(Argued October 18, 1900; decided November 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 22, 1898, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court, and an order denying a motion for a new trial.

*Roger A. Pryor* for appellant.

*George Hoadly* and *William Strauss* for respondent.

Judgment affirmed, with costs, on opinion of FOLLETT, J. (84 Hun, 103).

CONCUR: GRAY, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ. Not sitting: PARKER, Ch. J.

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SAMUEL W. CASTNER et al., Respondents, v. JOHN DURYEA,  
Appellant.

*Herbert v. Duryea*, 34 App. Div. 478, affirmed.  
(Argued October 19, 1900; decided November 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 23, 1898, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court.

*Reuben Leslie Maynard* for appellant.

*Jacob Marks* for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ. Not voting: PARKER, Ch. J., and GRAY, J.

HENRY L. HERBERT et al., Respondents, v. JOHN DURYEA,  
Appellant.

*Herbert v. Duryea*, 34 App. Div. 478, affirmed.  
(Argued October 19, 1900; decided November 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 23, 1898, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court.

*Reuben Leslie Maynard* for appellant.

*Jacob Marks* for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ. Not voting: PARKER, Ch. J., and GRAY, J.

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THE DOSORIS POND COMPANY, Respondent, v. EDWARD J.  
CAMPBELL et al., Appellants.

*Dosoris Pond Co. v. Campbell*, 25 App. Div. 179, affirmed.  
(Argued October 19, 1900; decided November 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 8, 1898, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

*George B. Stoddart* for appellants.

*Wilmot Townsend Cox* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN and WERNER, JJ. Not sitting: CULLEN, J.

LULU EMIL, Respondent, *v.* FREDERICK ALDHOUS, Appellant.

*Emil v. Aldhous*, 34 App. Div. 681, affirmed.

(Submitted October 19, 1900; decided November 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 26, 1898, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

*Joseph N. Tuttle* for appellant.

*Alex. Blumenstiel* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch., J., GRAY, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

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SILAS LAIRD, Respondent, *v.* FREDERICK M. LITTLEFIELD, Appellant.

*Laird v. Littlefield*, 34 App. Div. 43, affirmed.

(Submitted October 19, 1900; decided November 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 12, 1898, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term, and an order denying a motion for a new trial.

*Frederick M. Littlefield* and *George L. Allen* for appellant.

*Wood & Morschauer* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN and WERNER, JJ. Not sitting: CULLEN, J.

**STEPHEN MEARNS, Respondent, v. THE CENTRAL RAILROAD  
COMPANY OF NEW JERSEY, Appellant.**

(Submitted October 1, 1900; decided November 2, 1900.)

Motion for reargument denied, with ten dollars costs.  
(See 163 N. Y. 108.)

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**MERCHANTS' BANK OF BUFFALO, Respondent, v. LOUIS WEILL,  
Appellant, Impleaded with Others.**

(Submitted October 8, 1900; decided November 2, 1900.)

Motion for reargument denied, with ten dollars costs.  
(See 163 N. Y. 486.)

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**HUGO JAECKEL, Appellant and Respondent, v. THE AMERICAN  
CREDIT INDEMNITY COMPANY OF NEW YORK, Respondent  
and Appellant.**

*Jaeckel v. Am. Credit Indemnity Co.*, 84 App. Div. 565, affirmed.  
(Argued October 22, 1900; decided November 13, 1900.)

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 12, 1898, modifying and affirming as modified a judgment in favor of plaintiff entered upon the report of a referee.

*Benjamin N. Cardozo* and *A. J. Simpson* for plaintiff,  
appellant and respondent.

*Eugene Treadwell* for defendant, respondent and appellant.

Judgment affirmed, without costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN,  
CULLEN and WERNER, JJ.

LOUIS W. GAY, Appellant, v. EARL D. HASKINS, Respondent.

*Gay v. Haskins*, 12 App. Div. 625, affirmed.

(Argued October 22, 1900; decided November 18, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 16, 1897, affirming a judgment in favor of defendant entered upon the report of a referee.

*Frank C. Ferguson* for appellant.

*Francis E. Wood* for respondent.

Judgment affirmed, with costs ; no opinion.

CONCUR : PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

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ROBERT H. MOORE et al., Appellants, v. JULIA L. BAKER, Respondent.

*Moore v. Baker*, 87 App. Div. 625, affirmed.

(Argued October 28, 1900; decided November 18, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 12, 1899, affirming a judgment in favor of defendant entered upon the report of a referee.

*Isaac Lawson* for appellants.

*John De Witt Peltz* for respondent.

Judgment affirmed, with costs ; no opinion.

CONCUR : PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*  
THOMAS REILLY, Otherwise Known as THOMAS COOLEY,  
Appellant.

*People v. Reilly*, 49 App. Div. 218, affirmed.

(Argued October 24, 1900; decided November 18, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 19, 1900, affirming a judgment of the Court of General Sessions of the Peace in the City of New York convicting the defendant of the crime of violating section 508 of the Penal Code in having in his possession burglars' tools.

*Thomas A. Atchison* for appellant.

*Charles E. Le Barbier* for respondent.

Judgment of conviction affirmed; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN,  
CULLEN and WERNER, JJ.

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SARAH LAWSON, Respondent, *v.* WILLIAM EGGLESTON,  
Appellant.

*Lawson v. Eggleston*, 28 App. Div. 52, affirmed.

(Argued October 24, 1900; decided November 18, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered August 1, 1898, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

*W. S. Thrasher* for appellant.

*Dana L. Jewell* and *J. R. Jewell* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN,  
CULLEN and WERNER, JJ.

HIRAM MOUNT, Appellant, *v.* ROBERT H. HAMBLEY et al.,  
Respondents.

*Mount v. Hambley*, 33 App. Div. 103, affirmed.  
(Argued October 24, 1900; decided November 13, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered August 8, 1898, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

*Wayland F. Ford* for appellant.

*Elon R. Brown* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN,  
CULLEN and WERNER, JJ.

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JULIUS LICHTENSTEIN et al., Respondents, *v.* ROBERT M. JARVIS et al., Appellants.

*Lichtenstein v. Jarvis*, 31 App. Div. 33, affirmed.  
(Argued October 25, 1900; decided November 13, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 11, 1898, affirming a judgment in favor of plaintiffs entered upon a verdict, and an order denying a motion for a new trial.

*W. J. Townsend* for appellants.

*Abram Kling* for respondents.

Judgment affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN,  
CULLEN and WERNER, JJ.

CATHARINE M. GALLAGHER et al., Respondents, *v.* THE  
KINGSTON WATER COMPANY, Appellant.

*Gallagher v. Kingston Water Co.*, 25 App. Div. 82, affirmed.  
(Argued October 29, 1900; decided November 13, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 28, 1898, affirming a judgment in favor of plaintiffs entered upon a verdict.

*A. T. Clearwater* for appellant.

*John G. Van Etten* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, O'BRIEN, HAIGHT, CULLEN and WERNER, JJ. Not sitting: PARKER, Ch. J., and LANDON, J.

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SUSAN BURCHELL, Respondent, *v.* HENRY H. VOGHT, Appellant,  
Impleaded with Another.

*Burchell v. Voght*, 35 App. Div. 190, affirmed.  
(Argued October 30, 1900; decided November 16, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 21, 1898, affirming a judgment in favor of plaintiff entered upon the report of a referee.

*Moses Shire* for appellant.

*Henry F. Allen* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON, CULLEN and WERNER, JJ.



LIONEL HAGENAERS, Respondent, *v.* ROBERT HERBST,  
Appellant.

*Hagenaers v. Herbst*, 30 App. Div. 546, affirmed.  
(Argued October 30, 1900; decided November 16, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 18, 1898, affirming a judgment in favor of plaintiff entered upon the report of a referee.

*Henry L. Scheuerman* and *Herbert R. Limburger* for appellant.

*Welton C. Percy* for respondent.

Judgment affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON, CULLEN and WERNER, JJ.

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JAMES H. HUMMEL, Respondent, *v.* ISAAC STERN et al.,  
Appellants.

*Hummel v. Stern*, 21 App. Div. 544, affirmed.  
(Argued October 30, 1900; decided November 16, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 16, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

*Henry L. Scheuerman* and *Herbert R. Limburger* for appellants.

*Bronson Winthrop*, *H. L. Stimson* and *G. B. MacComber* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON, CULLEN and WERNER, JJ.

THE GLENS FALLS PAPER MILL COMPANY, Appellant, v.  
SPENCER TRASK et al., Respondents.

*Glens Falls Paper Mill Co. v. Trask*, 29 App. Div. 449, affirmed.  
(Argued October 30, 1900; decided November 16, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 1, 1898, affirming a judgment in favor of defendants entered upon the report of a referee.

*William G. Wilson* for appellant.

*Welton C. Percy* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LONDON,  
CULLEN and WERNER, JJ.

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CHARLES H. KEEP et al., Individually and as Executors of  
ROGER W. KEEP, Deceased, Respondents, v. MAURICE G.  
WALSH et al., Appellants.

*Keep v. Walsh*, 33 App. Div. 643, affirmed.  
(Submitted October 31, 1900; decided November 16, 1900.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 24, 1898, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court.

The questions certified were as follows:

1. Upon the undisputed facts in this case, are the plaintiffs entitled to recover against the defendants?
2. The facts in this case being undisputed, are the defendants liable for the acts of their servant, Conniff, who caused the injury to plaintiffs' property for which the judgment herein was recovered?
3. Should the judgment herein be reversed, with costs in all the courts?

*P. F. King* for appellants.

*E. J. Taylor* for respondents.

Judgment affirmed, with costs, the first two questions certified answered in the affirmative, the third in the negative; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON, CULLEN and WERNER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOHN D. ELWELL, Appellant, v. THE MANHATTAN CHESS CLUB, Respondent.

*People ex rel. Elwell v. Manh. Chess Club*, 84 App. Div. 631, affirmed. (Argued November 2, 1900; decided November 16, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 9, 1898, affirming a judgment dismissing an alternative writ of mandamus directing the defendant to reinstate the relator as a member of the Manhattan Chess Club or to show cause to the contrary, entered upon a decision of the court at a Trial Term without a jury.

*Conway & Westbrook* for appellant.

*Roscoe H. Channing* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON, CULLEN and WERNER, JJ.

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MARIA L. TIFFT, as Executrix of JOHN V. TIFFT, Deceased, et al., Respondents, v. THE CITY OF BUFFALO, Appellant.

*Tift v. City of Buffalo*, 25 App. Div. 376, affirmed. (Argued November 2, 1900; decided November 16, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered Feb-

ruary 10, 1898, affirming a judgment in favor of plaintiffs entered upon the report of a referee.

*W. H. Cuddeback* for appellant.

*Geo. Wadsworth* for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LONDON, CULLEN and WERNER, JJ.

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THE BRECKENRIDGE COMPANY, Limited, Respondent, v. JAMES D. PERKINS et al., Appellants.

(Submitted November 12, 1900; decided November 16, 1900.)

Motion for reargument denied, with ten dollars costs, and the record corrected so as to show that the chief judge did not sit in the case according to the fact, the report in that respect being a clerical error. (See 163 N. Y. 563.)

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CHURCH OF ST. STANISLAUS, Respondent, v. ALGEMEINE VEREIN, Appellant.

*Church of St. Stanislaus v. Allgemeine Verein*, 81 App. Div. 183, affirmed. (Argued October 9, 1900; decided November 20, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 9, 1898, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

*Edward C. James, Abram I. Elkus* and *David T. Davis* for appellant.

*George M. Van Hoesen* and *Denis A. Spellissy* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LONDON, JJ.

THE TRAVELERS' INSURANCE COMPANY, Respondent, v. ANN HEALEY et al., Respondents; SAMUEL A. PETERSON, as Surviving Partner of PETERSON & PACKER, Appellant.

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*Travelers' Ins. Co. v. Healey*, 25 App. Div. 53, affirmed.  
(Argued October 11, 1900; decided November 20, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 14, 1898, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

*George R. Donnan* for appellant.

*Charles E. Patterson, C. C. Van Kirk and George H. Mallory* for respondents.

Judgment affirmed, on opinion of LANDON, J., below, with separate bills of costs in this court to the plaintiff and to defendant Ann Healey as against defendant Peterson.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ. Not sitting: LANDON, J.

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JANE McDONALD, Respondent, v. THE METROPOLITAN LIFE INSURANCE COMPANY, Appellant.

*McDonald v. Metropolitan L. Ins. Co.*, 25 App. Div. 631, affirmed.  
(Argued October 12, 1900; decided November 20, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 18, 1898, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

*Frank S. Coburn* for appellant.

*J. N. Hammond* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

ADOLFO CASOLA, Respondent, *v.* FRANCISCO VASQUEZ, Appellant, Impleaded with Another.

*Casola v. Kugelman*, 88 App. Div. 428, affirmed.

(Argued October 12, 1900; decided November 20, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 15, 1898, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

*William H. Blymyer* for appellant.

*Richard L. Sweezy* and *C. W. Bennett* for respondent.

Judgment affirmed, with costs, on opinion of PATTERSON, J., below.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LONDON, JJ.

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JOHN DUFFY, Respondent, *v.* ISABELLA M. BURTON, Appellant.

*Duffy v. Burton*, 20 App. Div. 51, affirmed.

(Submitted October 12, 1900; decided November 20, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered August 31, 1898, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

*Robert McC. Robinson* for appellant.

*William Romer* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LONDON, JJ.

In the Matter of the Judicial Settlement of the Accounts of  
ALBERT C. HALL and THOMAS G. RITCH, Appellants, as  
Trustees of ALVAH HALL, Deceased.

ISABEL M. HALL et al., Respondents.

(Submitted November 12, 1900; decided November 20, 1900.)

Motion for reargument denied, with ten dollars costs. (See  
164 N. Y. 196.)

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In the Matter of the Application for the Revocation of the  
Probate of the Last Will and Testament of JOHN KEEFF,  
Deceased.

ANNA M. MILLER et al., Appellants; WILLIAM W. GREY, as  
Executor of JOHN KEEFE, Deceased, et al., Respondents.

(Submitted November 12, 1900; decided November 20, 1900.)

Motion for reargument denied, with ten dollars costs. (See  
164 N. Y. 352.)

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WALLACE SWART, Respondent, v. THE VILLAGE OF SARATOGA  
SPRINGS, Appellant.

*Swart v. Vil. of Saratoga Springs*, 25 App. Div. 622, affirmed.  
(Argued October 12, 1900; decided November 20, 1900.)

APPEAL from a judgment of the Appellate Division of the  
Supreme Court in the third judicial department, entered May  
7, 1897, affirming a judgment in favor of plaintiff entered  
upon a verdict.

*Joseph P. Brennan* for appellant.

*H. C. Todd* and *Edgar T. Brackett* for respondent.

VANN, J. This case presents no question but what was  
presented and decided in three appeals recently before this  
court. (*Moody v. Village of Saratoga Springs*, 17 App. Div.

207; 163 N. Y. 581; *Davis v. Village of Saratoga Springs*, 17 App. Div. 623; 163 N. Y. 581; *Lasher v. Village of Saratoga Springs*, 17 App. Div. 624; 163 N. Y. 582.) It belongs to the same series and rests on the same facts. The appellant did not try to distinguish this case from the others, but submitted it without argument, after stating that the questions were in all respects like those presented in the *Moody*, *Davis* and *Lasher* cases.

The judgment should be affirmed, with costs, on the authority of *Moody v. Village of Saratoga Springs* (163 N. Y. 581).

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT and MARTIN, JJ., concur; LANDON, J., not sitting.

Judgment affirmed.



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*Survival of Action for Death by Negligence after Death of Administrator who was Sole Next of Kin of Decedent.* An action brought by the sole administrator and next of kin of a decedent under section 1902 of the Code of Civil Procedure for negligently causing the death of his intestate, survives the death of such sole administrator and next of kin, and his personal representative may be substituted as plaintiff therein, since the right of action given by that section is to recover damages for wrongs done to the property, rights or interests of the beneficiaries thereof and not for injuries to the person of the decedent and, therefore, is a property right which is not affected by the beneficiary's death but becomes a part of his estate. *Matter of Meekin v. B. H. R. R. Co.* 145

## **ACADEMIC QUESTION.**

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## **APPEAL.**

1. *Non-reviewable Order of Reversal in Criminal Case.* An order of reversal in a criminal case, that does not, upon its face, exclude the possibility that it was based upon an examination of the facts or made as matter of discretion, presents no question of law reviewable by the Court of Appeals. *People v. O'Brien.* 57

2. *Right to Attack Finding of Fact after Unanimous Affirmance.* Findings of fact by the trial court which have been unanimously affirmed by the Appellate Division cannot be questioned in the Court of Appeals as against evidence or without evidence. *Lawrence v. Congregational Church.* 115

3. *Modification of Decree Distributing Surplus in Foreclosure Proceedings.* The Court of Appeals may, upon appeal from an order of the Appellate Division reversing an order of the Special Term which confirmed the report of a referee in proceedings to distribute the surplus arising upon the foreclosure of a mortgage, modify the order by directing the payment first out of the surplus of an unpaid judgment with interest thereon, against a decedent in whose favor a trust had been declared by a grantee of the

**APPEAL — Continued.**

premises, but who by virtue of sections 72, 73 and 129 of the Real Property Law took the fee, the mere naked trust being abolished by the statute, although the referee's findings of fact did not include the claim preferred by the judgment creditor, owing to the fact that the referee held that the decedent never had title to the property, and although the order of the Appellate Division distributed the surplus among the children of the decedent, ignoring the judgment creditor's claim. *Wendt v. Walsh.* 151

4. *Right of Appellant to Complain of the Testimony of his own Witnesses.* Where plaintiff's witnesses have testified in explanation of and as an excuse for the delay in shipment that it was caused through plaintiff's inability to procure vessels by reason of a prejudice or discrimination existing against it at the foreign port and theirs is the only testimony upon the subject, he cannot complain on appeal that their testimony has been accepted as true and insist that there is no evidence of such prejudice or discrimination because his witnesses had assumed its existence without stating the particular facts tending to show it. *Eppens, Smith & Wiemann Co. v. Littlejohn.* 187

5. *Unanimous Affirmance of Surrogate's Decree by Appellate Division.* Where a referee acquits testamentary trustees of bad faith in making an investment, but holds them liable to the *cestuis que trust* on the ground that the character of the investment was illegal, and his report is confirmed by the surrogate, and the latter's decree is unanimously affirmed by the Appellate Division, which, while it holds that under the will the trustees were not limited to ordinary trust investments, was of the opinion that the investment was speculative and hazardous and, therefore, improper, the Court of Appeals must affirm the judgment, and cannot look into the evidence to see how speculative or unreasonable the investment was. *Matter of Hall.* 196

6. *When Question of Law Dependent upon Determination of Question of Fact is not Reviewable.* The question as to whether a contract is void under the Statute of Frauds is ordinarily a question of law reviewable by the Court of Appeals under an exception taken to a refusal to nonsuit upon that ground; but in a case where that question is dependent upon the determination of a question of fact, viz., as to whether there was a consideration sufficient to sustain the contract, and that has been settled by a verdict and by a unanimous affirmance by the Appellate Division of the judgment entered thereon, exceptions to the refusal to nonsuit upon that ground raise no question which the Court of Appeals has power to review. *Lamkin v. Palmer.* 201

7. *When Question is not Academic.* An enactment by the legislature prohibiting in express terms the corporation counsel of the city of New York from making an offer of judgment against the city, does not render the question of the power of a corporation counsel to confess judgment academic as to cases arising prior to its passage or as to cases arising in other cities of the state. *Bush v. O'Brien.* 205

8. *Presumption of Reversal upon Questions of Law — Code of Civ. Pro. § 1338.* An order of the Appellate Division reversing a judgment of the Special Term and granting a new trial which does not state that the reversal was upon the facts, must be presumed to have been made on questions of law; and where the record discloses no errors in the reception or rejection of evidence, or in material findings of fact unsupported by any evidence, or in conclusions of law not sustained by the facts found, it must be reversed, and the judgment of the Special Term affirmed. *Newman v. N. Y. Mut. S. & L. Assn.* 248

9. *Assumption as to Theory of Recovery.* Where a plaintiff seeks to recover upon one of two theories, and the amount of the verdict depends upon which theory the jury finds to be in accord with the facts, their ver-

**APPEAL — Continued.**

dict for the plaintiff in one of the amounts is to be taken as establishing the theory which would entitle the plaintiff to that amount, and the questions to be decided upon appeal are those which depend upon that assumption. *Louenstein v. Lombard, Ayres & Co.* 324

10. *Presumption of Reversal upon Question of Law — Code of Civ. Pro.* §§ 1338, 1361. An order of the Appellate Division which reverses a surrogate's decree revoking probate of a will, which does not state that the reversal was upon the facts, must be reversed if the record discloses no error of law and the decree of the surrogate affirmed. *Matter of Keefe.* 352

11. *Reversal by Appellate Division without Awarding New Trial.* A reversal of a judgment of the trial court by the Appellate Division without awarding a new trial, but ordering a referee to take certain proof and report it to the Special Term, with a direction for final judgment thereon, is unauthorized and irregular, and must be set aside. *Van Beuren v. Wotherspoon.* 368

12. *Presumption as to Reversal upon Questions of Law.* A reversal of a judgment of the trial court by the Appellate Division must be presumed under the Code of Civil Procedure, section 1338, to have been made upon questions of law, when the order of reversal contains no statement that the judgment was reversed upon the facts. *Id.*

13. *Reversal of Judgment Dismissing Complaint.* A judgment, dismissing the complaint for lack of diligence or effort upon the part of the plaintiffs to procure a valuation of property in the manner prescribed by a lease, cannot be reversed by the Appellate Division upon the law, although it might have been reversed upon the facts unless the judgment was without any evidence to support it. *Id.*

14. *Intermediate Order — Code Civ. Pro. §§ 999, 1316 — Remittance of Case for Consideration by Appellate Division.* An order denying a motion for a new trial upon the minutes upon the grounds specified in section 999 of the Code of Civil Procedure, is an intermediate order within the meaning of section 1316; and an order of the Appellate Division, striking out from a notice of appeal thereto a statement of appellant's intention to bring up for review the order denying the motion for a new trial, must be reversed and the case remitted to the Appellate Division to consider the questions brought up by the notice of appeal which were not passed upon by that court. *Taylor v. Smith.* 399

15. *Dismissal of Counterclaim on the Ground that the Facts Stated do not Constitute a Cause of Action.* Where, in an action by the manufacturer for a balance due on account of goods sold and delivered, the dealers interposed a counterclaim, alleging a breach of the plaintiff's implied contract to furnish them with goods, a dismissal of the counterclaim, on the ground that the facts stated did not constitute a cause of action, after defendants had opened their case to the jury, had entered upon their evidence and had shown that the plaintiff had sold and transferred his business, is erroneous, where the motion to dismiss was not based upon any insufficiency of the evidence, but upon the ground that there was no such implied contract, and the record does not show that the defendants had closed their case when the dismissal was made. *Ellis v. Miller.* 434

16. *Granting New Trial in Capital Case for Error not Excepted to.* The power conferred upon the Court of Appeals by section 528 of the Code of Criminal Procedure to order a new trial when the judgment is of death, if satisfied that the verdict was against the weight of evidence, or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below, may be properly exercised when

**APPEAL** — *Continued.*

it is apparent that the defendant has suffered gross injustice by the admission of incompetent evidence upon the main and vital issue, even though the defendant's counsel failed to object to its reception; but the provision of the Code was not intended to relieve counsel of the duty of objecting, and in case their objection is overruled, of taking an exception, to the admission of incompetent evidence. *People v. Kennedy.* 449

17. *When New Trial Will not be Granted.* The power conferred by that section upon the Court of Appeals is a power to be exercised or withheld in its discretion, and where that court is satisfied that the accused has had a fair trial and that he is guilty of the crime charged, a new trial will not be granted. *Id.*

18. *Non-reviewable Order of Appellate Division Granting New Trial.* An order of the Appellate Division granting a new trial in an action tried before a jury, where there is a conflict in the evidence and the order may have been based upon the insufficiency of the evidence, is not reviewable by the Court of Appeals, unless it appears from the record that the order denying a new trial was affirmed as to the facts or the appeal therefrom dismissed. *Caponigri v. Altieri.* 476

19. *Allowance of Appeal from Non-reviewable Order Does not Affect its Disposition.* The allowance by the Appellate Division of an appeal to the Court of Appeals does not require the adoption of any different rule in determining the questions thus brought before it from that enforced in ordinary cases where no such allowance is necessary, and where the appeal is from an order not reviewable, it must be dismissed notwithstanding its allowance. *Id.*

20. *The Appellate Division has no Authority to Reverse by Modifying a Portion of an Order not Appealed From.* Where it appears upon the face of an order of the Appellate Division that upon an appeal from an order of the Special Term it reversed a portion thereof ordering a new trial, which was not appealed from, by modifying it and directing that the trial be continued before a different referee than that named in the Special Term order, the appellant has the right to insist in the Court of Appeals upon an appeal thereto from an affirmance by the Appellate Division of the judgment obtained against him upon the trial had in pursuance of such order, that the order was in excess of the authority of the Appellate Division, and, hence, that the proceedings based thereon were illegal. *Ferguson v. Bruckman.* 481

21. *All Grounds Relied upon for Dismissal Must be Specified on First Motion Therefor.* Where a motion has been made for the dismissal of an appeal to the Court of Appeals, a subsequent motion, based upon grounds which were not brought to the attention of the court upon the first motion, must be denied; since a party may not make as many separate motions to dismiss an appeal as he has, or supposes he has, distinct grounds therefor, but must instead assign on his first motion all the reasons that he relies upon for a dismissal. *Id.*

22. *Review of Finding of Fact — Unanimous Affirmance by Appellate Division.* The unanimous affirmance by the Appellate Division of a judgment against a bank in favor of a depositor for a balance on his account without deducting the amount by which checks were raised by his bookkeeper, withdraws from the review of the Court of Appeals the evidence upon which the trial court based its finding that the plaintiff was not negligent in the examination of his accounts; and, if there is no finding of fact inconsistent with the finding as to negligence, the court cannot review that finding, notwithstanding the defendant's contention that a proved and uncontradicted fact which, however, the court did not find, conclusively established the plaintiff's negligence, no exception to the omission to find that fact having been taken. *Clark v. Nat. Shoe & Leather Bank.* 498

**APPEAL — Continued.**

23. *Construction of Finding.* A finding by the trial court in an action by a depositor against a bank for a balance due without deducting the amount by which checks were raised by his bookkeeper, that on a specified date the "plaintiff discovered the said forgeries and notified the defendant thereof with due diligence," taken in connection with the further finding that the plaintiff "was in no way negligent" in his examination of the accounts stated by the bank, imports that the plaintiff objected within a reasonable time to the accounts stated by the bank. *Id.*

Modification of decree distributing surplus in foreclosure proceedings.

*See* TRUSTS, 2.

Modification of decree protecting trustees.

*See* TRUSTS, 5.

When error in sustaining witness' claim of privilege not prejudicial.

*See* WITNESS, 3.

**APPELLANT.**

Right to complain on appeal of testimony of his own witness.

*See* APPEAL, 4.

**APPELLATE DIVISION.**

Unanimous affirmance of findings of fact.

*See* APPEAL, 2.

Modification of order of Appellate Division reversing order distributing surplus in foreclosure proceedings.

*See* APPEAL, 3.

Unanimous affirmance of surrogate's decree.

*See* APPEAL, 5.

Unanimous affirmance as to consideration to sustain contract.

*See* APPEAL, 6.

Omission to state in order that reversal was upon the facts.

*See* APPEAL, 8, 10, 12.

Has no authority to reverse by modifying a portion of an order not appealed from.

*See* APPEAL, 20.

Unanimous affirmance by, not reviewable when no finding of fact is inconsistent with the finding of law, and the failure to find other proved facts is not excepted to.

*See* APPEAL, 22.

**ASSESSMENT.**

For local improvement — defect apparent on face of proceedings.

*See* MUNICIPAL CORPORATIONS, 1.

Waiver of constitutional objection to mode of assessment.

*See* MUNICIPAL CORPORATIONS, 2.

Irregularity in proceeding for street improvement cured by statute.

*See* MUNICIPAL CORPORATIONS, 3.

Variance between petition and ordinance as to kind of paving material.

*See* MUNICIPAL CORPORATIONS, 4.

**ASSIGNMENT.**

1. *Assignment of Mechanic's Lien — Counterclaim or Set-off Available against Assignee — Effect of New Contract between Owner and Assignor.* An owner, who, after the termination of the original building contract without the fault of the builder, and after the latter had commenced an action to foreclose his mechanic's lien and had assigned the lien and cause of action, but without knowledge of the assignment, entered into a new contract with the assignor with reference to the same subject-matter, is not entitled to set off against the assignee any damages arising out of the assignor's failure to perform the new contract, but is entitled to set off whatever he actually paid to the assignor upon the assigned claim, after the assignment, in good faith and without notice. *Lawrence v. Congregational Church.* 115

2. *Waiver of Defect of Parties.* A defect of parties to an action by an assignee of a mechanic's lien to foreclose the same, arising from the failure to join a prior assignee, to whose assignment plaintiff's assignment was expressly subject, is waived where the attention of the trial court is not in any manner or form directed to the point at the trial. *Id.*

3. *Action by Assignee of Claim Assigned as Collateral Security — State of Accounts — Burden of Proof.* The assignee of a claim under a written assignment which vests the legal title in him, though as security for a debt, is not bound in an action against the debtor to prove the existence of a debt from the assignor to himself, as the state of accounts between the assignor and assignee does not concern the defendant, or, if it does, the burden is upon him to prove such a state of facts as would render the assignment inoperative or reinvest the assignor in equity with the beneficial ownership of the claim. *Id.*

4. *Order Substituting Assignee as Plaintiff — Effect as an Adjudication of Right to Prosecute the Action.* An order, made upon notice to defendant, substituting the assignee of a claim under an assignment as collateral security as plaintiff in place of the assignor is, in effect, an adjudication that the assignee has such an interest in the claim under the assignment as entitles him to prosecute the action. *Id.*

5. *Evidence — Parol Evidence to Sustain Agreement for Extra Compensation to Assignee for Creditors.* Parol proof tending to show that the extra compensation to an assignee for creditors, stipulated for in a writing executed by the assignor after the assignment, was reasonable or proper, is wholly inadmissible in determining whether the agreement to pay the extra compensation is valid in its general scope and purpose, since the law impressed upon the paper, as soon as it was made and delivered, a legal character which followed it for all time without regard to the opinion which the assignee or his witnesses had with respect to its operation, whether fair and reasonable or otherwise. *Carpenter v. Taylor.* 171

6. *Agreement Void for Want of Consideration.* An agreement between an assignor and assignee for creditors, subsequent to the execution of the assignment, for the payment of extra compensation to the assignee, is void for want of consideration where the only consideration claimed is the obligation of the assignee to administer the trust to the best of his knowledge, skill and ability, since he was already bound to do that. *Id.*

7. *Agreement Invalid as against Public Policy.* Such an agreement is invalid on the ground of public policy, since the disability of a trustee to bargain with the beneficiary for a share or interest in the property, whether in the form of compensation or otherwise, is absolute in order to avoid the possibility of fraud. *Id.*

8. *Assignee for Creditors is within Prohibition against Receiving Greater Compensation than Allowed by Law. — Code of Civ. Pro. § 3280.* An assignee for creditors is within section 3280 of the Code of Civil Proceed-

**ASSIGNMENT — Continued.**

ure, forbidding an officer or other person, to whom a fee or other compensation is allowed by law for any service, to charge or receive a greater fee or reward for that service than is so allowed, and, therefore, an agreement to pay such extra compensation creates no binding obligation.

*Id.*

**ATTORNEY AND CLIENT.**

1. *When Client Chargeable with Knowledge Acquired by Attorney.* Where the attorney of an attaching creditor who has levied upon the interest of his debtor in stock pledged as collateral security for a loan by a third person, subsequently acts as attorney for the lender in making a sale of the stock at public auction to pay the loan, at which sale the attaching creditor bids in the stock for an amount sufficient to pay the loan and expenses of sale, the attorney must be considered as the agent for both creditors in making the sale, and the creditor so purchasing is bound by any invalidity of the sale in respect of demand or notice of which the attorney had knowledge. *McCutcheon v. Dittman.* 355

2. *Waiver of Lien by Declaration of Trust.* An attorney who makes a formal and explicit declaration of trust in favor of his client, with the statement that he holds property, which was the proceeds of a judgment recovered through him, for the purposes expressed in said judgment, and in no other way, and that upon the conveyance of the property to such persons as the *cestui que trust* may designate, he will pay over the proceeds of the sale to the latter, expressly waives any general or specific lien he may have had thereon for services rendered as attorney to the *cestui que trust*. *West v. Bacon.* 425

**BILLS, NOTES AND CHECKS.**

1. *Promissory Note — Liability for Indorsement before Delivery to Payee.* Where a note is indorsed before its delivery to the payee at the request of the maker, the indorser knowing before such indorsement that his name is required by the payee as a condition of making the loan to, or procuring it for, the maker and as security for its payment, the indorser is placed in the same relation to the payee as if he had indorsed by express agreement with him, and is liable as first and not as second indorser. *Davis v. Bly.* 527

2. *Presumption Arising from Face of Note not Conclusive.* The presumption arising from the face of a note that one who indorsed the same before delivery to the payee is not liable to the latter, is not conclusive and may be overcome by evidence that he intended to become liable as first, and not as second, indorser. *Id.*

Written agreement to pay debt of third party, not a promissory note.

*See CONTRACT, 7.*

When parties liable on firm note outside of firm business.

*See PARTNERSHIP.*

When payee chargeable with notice of incapacity of drawer of check and liable to restoration.

*See MONEY HAD AND RECEIVED.*

**BONDHOLDERS.**

Reorganization by bondholders' committee.

*See CORPORATIONS, 2-5.*

**BOOKS OF ACCOUNT.**

Entries not made by witness.

*See EVIDENCE, 12.*

**BURDEN OF PROOF.**

As to reasonable time for performance of contract.

See SALES, 1, 2.

**CAPITAL CASE.**

Exceptions to incompetent evidence.

See CRIMES, 8.

When new trial therein not granted.

See CRIMES, 9.

**CHATTEL MORTGAGE.**

Effect of delay in filing mortgage covering real and personal estate on its validity as real estate mortgage.

See MORTGAGE.

**CIVIL SERVICE.**

1. *New York City — Tenure of Probationary Appointee.* Where one has been appointed to a position in the civil service of the city of New York for a probationary term, as prescribed by the civil service rules of that city, he cannot be removed during such term except for cause after an opportunity to explain, and a rule providing for his peremptory discharge during the term, without notice of charges or an opportunity to be heard, is invalid, and his peremptory discharge thereunder unlawful. *People ex rel. Kaslor v. Kearny.* 64

2. *New York City — Summary Removal of Employees.* Employees transferred to departments of the city of New York pursuant to section 1536 of the Greater New York charter (L. 1897, ch. 378), who were not subject to removal, without cause, before the transfer, are given the same security of tenure they previously enjoyed, but employees who, before the transfer, were removable at the pleasure of the appointing power may be discharged without cause by the head of the department to which they have been transferred. *People ex rel. Percival v. Cram.* 166

3. *Dockmasters are Public Officers.* Dockmasters in the department of docks in the city of New York are public officers and not merely clerks or employees, since the captain and harbor masters of the port, to whose functions they succeeded, were unquestionably public officers, and dockmasters are recognized as officers by section 848 of the charter providing that a dockmaster "shall not appoint any deputy, or assistant, or delegate the powers of his office to any person or persons whatever." *Id.*

4. *Validity of Rule Prohibiting Summary Removals.* Rule 42 of the regulations of the municipal civil service commission of the city of New York, forbidding the removal of any person in the classified service until a statement of the causes of removal has been filed with the commission and a copy of the same furnished to the person sought to be removed, and until such person has been afforded an opportunity to present an explanation in writing, is invalid, so far as it applies to a public officer, *e. g.*, a dockmaster in the department of docks, whose term is not prescribed, since article 10, section 3, of the Constitution provides that when the duration of an office is not provided by the Constitution, it may be declared by law, and if not so declared shall be held during the pleasure of the authority making the appointment; and, assuming that such was the statutory intent, the legislature cannot delegate its power to prescribe the duration of term and permanence of tenure of public officers to the civil service commission, nor can the term of an office be prescribed by its regulation. *Id.*

**CODE OF CIVIL PROCEDURE.**

1. § 394 — *Limitation of Action to Enforce Penalty.* The cause of action to enforce the penalty prescribed for failure to file the annual report of a corporation required by law, on account of a default, made before the



**CODE OF CIVIL PROCEDURE — Continued.**

maturity of bonds or interest coupons for the amount of which it is sought to hold the directors, accrues at the dates respectively of the maturity of the coupons and the bonds, as to the directors then in office; and the liability of a director, whose election and default in filing the report occurs after the maturity of the debt, attaches at the time his default is complete, since the debt is "then existing;" and if the action is begun within three years from the earlier date it is within the limitation prescribed by section 394 of the Code of Civil Procedure. *Morgan v. Hedstrom.* 224

2. § 974 — *Separate Trial of Counterclaim also Constituting a Defense will not be Granted.* Where the answer in an action on contract alleges as a defense and also by way of a counterclaim that the agreement was to pay a certain sum instead of that stated in the contract, and that defendant's signature was procured through fraud, and demands the reformation of the contract, a motion under section 974 of the Code of Civil Procedure that the equitable issue raised by the pleadings be first tried by the court is properly denied, since the matter alleged as a counterclaim, if proved, also constitutes a defense and relieves the defendant as fully as the allowance of the counterclaim, and the provisions of that section have no application, but were intended to provide for the mode of trial of an issue arising upon a counterclaim in which the facts alleged do not constitute a defense and are not available as such. *Bennett v. Edison El. L. Co.* 181

3. § 999 — *Appeal — Intermediate Order — Remittance of Case for Consideration by Appellate Division.* An order denying a motion for a new trial upon the minutes upon the grounds specified in section 999 of the Code of Civil Procedure, is an intermediate order within the meaning of section 1316; and an order of the Appellate Division, striking out from a notice of appeal thereto a statement of appellant's intention to bring up for review the order denying the motion for a new trial, must be reversed and the case remitted to the Appellate Division to consider the questions brought up by the notice of appeal which were not passed upon by that court. *Taylor v. Smith.* 399

4. §§ 1048, 1174 — *Crimes — Extra Panel of Jurors — Sheriff's Return.* The provision of section 1174 of the Code of Civil Procedure, requiring the sheriff to make return, as prescribed in section 1048, of the persons drawn on an extra panel of jurors, applies to the form and manner of the return and not to the time, since the requirement of section 1048 is that the return be made at or before the opening of the court, which is obviously impossible in case of an extra panel drawn after the commencement of the term; and if the return is actually filed before the court overrules a challenge to the array of the extra panel it is in time. *People v. Lammerts.* 137

§ 1316. See par. 3, this title.

5. § 1338 — *Appeal — Presumption of Reversal wholly upon Questions of Law.* An order of the Appellate Division reversing a judgment of the Special Term and granting a new trial which does not state that the reversal was upon the facts, must be presumed to have been made on questions of law; and where the record discloses no errors in the reception or rejection of evidence, or in material findings of fact unsupported by any evidence, or in conclusions of law not sustained by the facts found, it must be reversed, and the judgment of the Special Term affirmed. *Neuman v. N. Y. Mut. S. & L. Assn.* 248

6. *Idem* — *Appeal — Presumption of Reversal wholly upon Question of Law.* An order of the Appellate Division which reverses a surrogate's decree revoking probate of a will, which does not state that the reversal was upon the facts, must be reversed if the record discloses no error of law and the decree of the surrogate affirmed. *Matter of Keefe.* 352

**CODE OF CIVIL PROCEDURE — Continued.**

7. *Idem* — *Presumption as to Reversal upon Questions of Law.* A reversal of a judgment of the trial court by the Appellate Division must be presumed under the Code of Civil Procedure, section 1338, to have been made upon questions of law, when the order of reversal contains no statement that the judgment was reversed upon the facts. *Van Beuren v. Wotherspoon.* 368

§ 1361. See par. 6, this title.

8. § 1742 — *Action to Annul a Marriage — Power of Supreme Court to Grant Alimony and Counsel Fees.* The Supreme Court, in an action against a wife to annul a ceremonial marriage, has, in a proper case, as an incident to its jurisdiction to entertain the action, power to grant alimony and counsel fees *pendente lite*, although the provisions of the Code of Civil Procedure (§§ 1742 *et seq.*) authorizing and regulating actions to annul a marriage are silent as to alimony and counsel fees. *Higgins v. Sharp.* 4

9. § 1902 — *Distribution of Damages Recovered in Action for Causing Death by Negligence.* The provisions of the Code of Civil Procedure (§§ 1902 *et seq.*) authorizing the maintenance of an action where a decedent's death was caused by a wrongful act, neglect or default and providing for the distribution of the damages recovered, were intended by the legislature to create a new cause of action for the benefit, as a class, of the husband or wife and next of kin, and when the class consists of the widow and the father only, the latter is, under section 2732, subdivision 7, entitled to share equally with the widow in a judgment which she has recovered for her husband's death by negligence, proper deduction being made for the expenses of her action and her commissions upon the recovery as his administratrix. *Matter of Snedeker v. Snedeker.* 58

10. *Idem* — *Survival of Action for Death by Negligence after Death of Administrator who was Sole Next of Kin of Decedent.* An action brought by the sole administrator and next of kin of a decedent under section 1902 of the Code of Civil Procedure for negligently causing the death of his intestate, survives the death of such sole administrator and next of kin, and his personal representative may be substituted as plaintiff therein, since the right of action given by that section is to recover damages for wrongs done to the property, rights or interests of the beneficiaries thereof and not for injuries to the person of the decedent, and, therefore, is a property right which is not affected by the beneficiary's death but becomes a part of his estate. *Matter of Meekin v. Brooklyn Heights R. R. Co.* 145

11. § 2076 — *Parties — Waiver of Defect — Demurrer.* The owner and lessor of a railroad is not a necessary party to a proceeding by mandamus against a lessee railroad company to compel the restoration of a highway, and if it were, where the defect of parties appears upon the face of the proceedings and defendant fails to object thereto by demurrer under section 2076 of the Code of Civil Procedure, it is waived. *People ex rel. Bacon v. No. Central Ry. Co.* 289

12. § 2284 — *Contempt — When One Payment of Fine Imposed upon Several Defendants for a Civil Contempt is a Satisfaction as to All.* Where a motion is made to punish several defendants for a civil contempt in willfully disobeying an injunction order directed to and issued against all the defendants proceeded against, and an order adjudging them guilty of such contempt does not state the actual loss or injury of the plaintiff, nor any items from which the amount thereof may be computed or inferred, under subdivision 2 of section 2284 of the Code of Civil Procedure, a single fine of \$250 may be imposed upon all of the defendants served in the proceeding, for which each defendant is severally liable, and in default, any one and all are liable to imprisonment, but one payment is a satisfaction as to all. *Socialistic Co-op. Pub. Assn. v. Kuhn.* 473

§ 2732. See par. 9, this title.

**CODE OF CIVIL PROCEDURE — Continued.**

13. § 3253 — *Costs — Extra Allowance.* Under section 3253 of the Code of Civil Procedure, an additional allowance, not exceeding five per centum, to the prevailing party is a part of the costs of the action and may be allowed to the defendant where the plaintiff recovers less than fifty dollars. *United Press v. N. Y. Press Co.* 406

14. § 3280 — *Assignee for Creditors is within Prohibition against Receiving Greater Compensation than Allowed by Law.* An assignee for creditors is within section 3280 of the Code of Civil Procedure, forbidding an officer or other person, to whom a fee or other compensation is allowed by law for any service, to charge or receive a greater fee or reward for that service than is so allowed, and, therefore, an agreement to pay such extra compensation creates no binding obligation. *Carpenter v. Taylor.* 171

**CODE OF CRIMINAL PROCEDURE.**

1. § 393 — *Commenting on Defendant's Failure to Testify — When Cured.* Any error resulting from comments by the district attorney, upon the failure of defendant in a murder trial to testify in his own behalf, is cured where the trial court, at the defendant's request, calls the attention of the jury to the provisions of section 393 of the Code of Criminal Procedure, and charges them that while the defendant in all cases may testify in his own behalf, still, his neglect or refusal to do so does not create any presumption against him. *People v. Priori.* 459

2. § 528 — *Appeal — Granting New Trial in Capital Case for Error not Excepted to.* The power conferred upon the Court of Appeals by section 528 of the Code of Criminal Procedure to order a new trial when the judgment is of death, if satisfied that the verdict was against the weight of evidence, or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below, may be properly exercised when it is apparent that the defendant has suffered gross injustice by the admission of incompetent evidence upon the main and vital issue, even though the defendant's counsel failed to object to its reception; but the provision of the Code was not intended to relieve counsel of the duty of objecting, and, in case their objection is overruled, of taking an exception, to the admission of incompetent evidence. *People v. Kennedy.* 449

3. *Idem* — *When New Trial Will not be Granted in a Capital Case.* The power conferred by that section upon the Court of Appeals is a power to be exercised or withheld in its discretion, and where that court is satisfied that the accused has had a fair trial and that he is guilty of the crime charged, a new trial will not be granted. *Id.*

**CONSTITUTIONAL LAW.**

1. *Elections — Residence of Voters — Seminary Students.* Under section 3 of article 2 of the Constitution of the state of New York, residence for the purpose of voting is neither gained nor lost by a sojourn in a seminary of learning, and the fact that a student enters a seminary to be educated for a certain calling, and to remain there after graduation until assigned to duty, instead of a fixed course of four years, as is usual in institutions of learning, does not entitle him to vote in the election district in which such seminary is situated. *Matter of Barry.* 18

2. *Municipal Court of the City of New York is not a new Local and Inferior Court — Jurisdiction over Foreign Corporations — Constitution, Art. 6, § 18.* The Municipal Court of the city of New York is a continuation, consolidation and reorganization of the District Courts of the old city of New York and the Justices' Courts in the first, second and third districts of the old city of Brooklyn under a new name, and is not a new local inferior court within section 18 of article 6 of the Constitution authorizing the legislature to establish inferior local courts, but prohibiting it from "hereafter" conferring upon any inferior local court

**CONSTITUTIONAL LAW—Continued.**

of its creation any equity jurisdiction or any greater jurisdiction in other respects than is conferred upon County Courts by or under "this" article; and the provision of section 1364 of "the Greater New York charter," that such court shall have jurisdiction "of a foreign corporation having an office in the city of New York," does not violate such constitutional provision, but merely confers upon the Municipal Court the jurisdiction which had been exercised for many years by the local tribunals consolidated in that court. *Worthington v. London G. & A. Co.*

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3. *Scope of Constitutional Limitation.* Assuming that the Municipal Court of the city of New York is a new local court, the provision conferring upon it jurisdiction "of a foreign corporation having an office in the city of New York" would not violate section 18 of article 6 of the Constitution, since the limitation thereby imposed upon the power of the legislature to confer jurisdiction upon future inferior local courts relates to the jurisdiction as to subject-matter, and not as to territory, non-resident parties defendant or foreign corporations. *Id.*

**CONTEMPT.**

*When One Payment of Fine Imposed upon Several Defendants for a Civil Contempt is a Satisfaction as to All—Code Civ. Pro. § 2284, Subd. 2.* Where a motion is made to punish several defendants for a civil contempt in willfully disobeying an injunction order directed to and issued against all the defendants proceeded against, and an order adjudging them guilty of such contempt does not state the actual loss or injury of the plaintiff, nor any items from which the amount thereof may be computed or inferred, under subdivision 2 of section 2284 of the Code of Civil Procedure, a single fine of \$250 may be imposed upon all of the defendants served in the proceeding, for which each defendant is severally liable, and in default, any one and all are liable to imprisonment, but one payment is a satisfaction as to all. *Socialistic Co.-Op. Pub. Assn. v. Kuhn.*

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**CONTRACT.**

1. *When Void for Want of Consideration.* An agreement between an assignor and assignee for creditors, subsequent to the execution of the assignment, for the payment of extra compensation to the assignee is void for want of consideration where the only consideration claimed is the obligation of the assignee to administer the trust to the best of his knowledge, skill and ability, since he was already bound to do that. *Carpenter v. Taylor.*

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2. *When Invalid as Against Public Policy.* Such an agreement is invalid on the ground of public policy, since the disability of a trustee to bargain with the beneficiary for a share or interest in the property, whether in the form of compensation or otherwise, is absolute in order to avoid the possibility of fraud. *Id.*

3. *When Void, as Tending to Create a Monopoly.* An agreement, between the producers of nearly the whole product of a commodity known as Hudson river blue stone and of at least ninety percentum of the whole amount sold, and a company which engages to sell all the marketable stone produced by them for the ensuing six years at prices fixed by an association composed of such producers, and to apportion the sales in specified proportions between them, no sales to be made except through the company, is void as against public policy, in that it threatens a monopoly whereby trade in a useful article may be restrained and its price unreasonably enhanced. *Cummings v. Union Blue Stone Co.*

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4. *Indefiniteness of Price to be Paid for Services.* An executory contract in writing, attempting to provide over a period of years for the furnishing

**CONTRACT** — *Continued.*

of news reports on each day at a price "not exceeding three hundred dollars during each and every week that said news report is received," is so indefinite as to the price to be paid as to preclude a recovery of substantial damages for its breach in refusing to receive the service; and the fact that the sum specified has been paid for a period of time is not an acknowledgment of an obligation to pay that amount during the whole contemplated life of the contract. *United Press v. N. Y. Press Co.* 406

5. *Contract to Furnish Goods—Measure of Damages for Breach of.* A contract to furnish at least \$1,000 worth of cigarettes a year, plus two per cent of that sum, is implied by an agreement for a term of five years, executed between a cigarette manufacturer and certain dealers, providing that the former shall allow the latter \$1,000 per annum to be deducted in equal monthly installments from current bills, and shall make a further allowance of two per cent below the price given to any other house in the states of New York and New Jersey on a certain brand of cigarettes, in consideration of which the dealers bind themselves to "push" that brand of cigarettes and not to push other brands, and the measure of damages for the breach of such contract by the manufacturer's refusal to furnish the cigarettes is the difference between the amount the dealers were to receive in case they performed it and the cost of performance. *Ellis v. Miller.* 484

6. *Appeal—Dismissal of Counterclaim on the Ground that the Facts Stated do not Constitute a Cause of Action.* Where, in an action by the manufacturer for a balance due on account of goods sold and delivered, the dealers interposed a counterclaim, alleging a breach of the plaintiff's implied contract to furnish them with goods, a dismissal of the counterclaim, on the ground that the facts stated did not constitute a cause of action, after defendants had opened their case to the jury, had entered upon their evidence and had shown that the plaintiff had sold and transferred his business, is erroneous where the motion to dismiss was not based upon any insufficiency of the evidence, but upon the ground that there was no such implied contract, and the record does not show that the defendants had closed their case when the dismissal was made. *Id.*

7. *Written Agreement to Pay Debt of Third Party, not a Promissory Note.* An instrument in writing, by which one promises to pay another a certain sum due from a third party on or before a day named therein, is not a promissory note importing a consideration, and in order to sustain a judgment based thereon a consideration must exist and be proved. *Bradt v. Krank.* 515

Measure of damages for breach of contract to furnish goods.

*See* DAMAGES, 4.

Parol evidence to sustain agreement for extra compensation to assignee for creditors.

*See* EVIDENCE, 8.

Admissibility of statement tending to show understanding of parties as to meaning of contract.

*See* EVIDENCE, 4.

When evidence of agreement is admissible, although the agreement is not pleaded.

*See* EVIDENCE, 5.

Evidence that agent had made similar contracts with other parties admissible for the purpose of defining the contract in question.

*See* EVIDENCE, 8.

**CONTRACT — Continued.**

When oral negotiations are not merged in written instrument.\*

See EVIDENCE, 9.

Shipment of goods must be made in reasonable time where no time fixed therefor.

See SALES, 1.

Rescission of — facts insufficient to constitute fraud.

See SALES, 7.

**CORPORATIONS.**

1. *Mutual Fire Insurance Company — Cash Policyholders Entitled to Vote at Election of Directors.* Holders of policies in a mutual fire insurance company, organized under chapter 239 of the Laws of 1896, as amended by chapter 47 of the Laws of 1848, who have paid a certain definite sum of money in full for insurance therein, in lieu and in place of a premium note therefor, are as fully and effectively insured as those who have given a premium note for insurance and are members of the company and entitled to vote at any election of its directors equally with note policyholders. *Matter of Mutual F. Ins. Co.* 10

2. *Reorganization Agreement — Construction as to Power of Bondholders' Committee.* A plan for the reorganization of a corporation, prepared and tendered by a voluntary committee to bondholders, who accept it and deposit their bonds thereunder, should be strictly construed as against the committee and in favor of the *cestuis que trust*. *United W. W. Co. v. Omaha W. Co.* 41

3. *Extent of Authority of Committee — Failure to Dissent.* Where a reorganization agreement provides that a detailed plan of reorganization shall be submitted to the bondholders prior to the conveyance of any purchased property to a new company, and that it shall be binding upon them unless a majority in interest shall within thirty days file a written dissent, the committee has no power to incorporate into it anything more than details for carrying out the general provisions of the original agreement, and the failure of the majority to dissent binds them in respect to such details only. *Id.*

4. *Departure from Reorganization Agreement.* A bondholders' committee, which is authorized by a reorganization agreement to procure the foreclosure of the mortgage securing the bonds, to purchase the property and convey it to a new company, in which event the committee, after the payment of the expenses of foreclosure and all its own expenses, is to allot to the holders of certificates, representing the bondholders' interest, their proportionate interest in the new company, has no power, after the purchase of the property under such circumstances as to cut off all other interests in it except that of the certificate holders, to incorporate into its detailed plan of reorganization a provision allotting to preferred shareholders of the old company a large part of the common stock of the new company at ten cents on the dollar; and the failure of a majority in interest of the certificate holders to file a written dissent to the plan does not make it binding upon them, since it is a departure from, and not a mere detail of, the plan contemplated by the original agreement. *Id.*

5. *Assumption of Power by Committee.* A provision in such detailed plan which authorizes the committee to control all of the stock of the new company until two issues of preferred stock shall have paid five per cent dividends for five consecutive years, at a rate of compensation for the committee to be fixed by themselves, or, in the event of question, by two persons to be selected by them, is unauthorized and beyond the power of the committee, where there is no such provision in the original agreement and no intimation that the bondholders' property was to be controlled for an indefinite period. *Id.*

**CORPORATIONS — Continued.**

6. *Stock Corporation Law—Construction of § 30.* The provision of section 30 of the Stock Corporation Law (L. 1892, ch. 688) which declares that if the annual report required by the law is not made and filed, the directors shall jointly and severally be personally liable for all the debts of the corporation then existing, is remedial, and, if necessary, should be liberally and not narrowly construed so as to embrace the debts within the language of the act, however strictly it may be construed as to the acts of the directors constituting their alleged default, or as to the evidence of debt of the corporation; and corporate bonds secured by a mortgage upon a corporation's real estate are within the meaning and intent as well as within the language of such provision. *Morgan v. Hedstrom.* 224

7. *Limitation of Action to Enforce Penalty.* The cause of action to enforce the penalty prescribed for failure to file the annual report required by law, on account of a default, made before the maturity of the bonds or interest coupons for the amount of which it is sought to hold the directors, accrues at the dates respectively of the maturity of the coupons and the bonds, as to the directors then in office; and the liability of a director, whose election and default in filing the report occurs after the maturity of the debt, attaches at the time his default is complete, since the debt is "then existing;" and if the action is begun within three years from the earlier date it is within the limitation prescribed by section 394 of the Code of Civil Procedure. *Id.*

8. *Liability of Directors for Successive Failures to File Annual Report — Joinder of New Directors.* Successive defaults in making and filing reports by the same directors do not renew as to them the penalty already incurred under section 30, but when a new member comes into the board a new default makes him jointly and severally liable for the debts "then existing," that is, he becomes jointly liable with the old members of the new defaulting board; and a single action may be maintained against both the old and new directors if brought before the Statute of Limitations bars the liability of either. *Id.*

9. *Effect of the Participation as Director in Previous Defaults by the Vendor of Bonds.* That the vendor of corporate bonds was at the time of the sale a director of the corporation and was participating with the other directors in the default in filing the annual report, and, therefore, could not enforce the penalty prescribed by section 30 against his co-directors, does not prevent the purchaser of the bonds from enforcing the penalty on account of a subsequent default by them in which the vendor also participated. *Id.*

10. *Mistake of Date at which Directors Incurred Penalty.* A mistake by the plaintiff in an action to enforce the penalty prescribed by section 30 for failure of directors to file the annual report, in alleging the date at which the penalty was incurred, due to a mistake as to the date the law fixes, is not reversible error if within the true dates the plaintiff has shown his right to recover. *Id.*

11. *Payment of Individual Debt with Corporate Checks by Officer of Corporation — When Payee Chargeable with Notice of Incapacity and Liable to Restoration.* The payee of corporate checks who receives them from the treasurer of the corporation in payment of a debt not owed by the corporation, but in payment of one which he has treated as the treasurer's individual debt, where the latter has no actual or apparent authority to issue such checks either in payment of his own debt or that of a third person, is chargeable with notice of his incapacity to issue them and is bound to inquire as to the real situation, and where he accepts the checks without question and draws the money thereon, he is liable in an action by the corporation to recover the amount paid as money received by him to its use. *Rochester & C. T. R. Co. v. Paviour.* 281

**COSTS.**

*Extra Allowance.* Under section 8253 of the Code of Civil Procedure an additional allowance, not exceeding five per centum to the prevailing party is a part of the costs of the action and may be allowed to the defendant where the plaintiff recovers less than fifty dollars. *United Press v. N. Y. Press Co.* 406

**COUNSEL FEE.**

In action to annul a marriage.

*See* HUSBAND AND WIFE.

**COUNTERCLAIM.**

Dismissal of.

*See* APPEAL, 15.

When available against assignee — effect of new contract between owner and assignor.

*See* MECHANICS' LIEN, 1.

Also constituting defense will not be granted separate trial.

*See* TRIAL, 1.

**COURT OF APPEALS.**

Cannot question as against or without evidence findings of fact unanimously affirmed.

*See* APPEAL, 2.

When evidence cannot be examined.

*See* APPEAL, 5.

When it has no power to review question of law dependent upon determination of question of fact.

*See* APPEAL, 6, 18.

Omission to state in order that reversal was upon the facts — when judgment of trial court must be affirmed.

*See* APPEAL, 8, 10, 12.

**COURTS.**

1. *New York City — Justices Transferred to Municipal Court have no Power to Appoint Clerks Thereof for Full Term.* Justices of the inferior courts of the cities of New York and Brooklyn, in office January 1, 1898, who were transferred to the Municipal Court of the city of New York as justices thereof to serve out their unexpired terms, have no power to appoint clerks of that court for terms of six years conferred by the new charter (L. 1897, ch. 378, § 1373) upon justices "elected or appointed as hereinbefore provided," since the words "elected or appointed" refer only to justices to be elected or appointed after the charter went into effect. *Stuber v. Coler.* 22

2. *Power of Transferred Justices to Fill Vacancies in Office of Transferred Clerks.* The transferred justices, having had power under the old system to supply themselves with clerks, may make appointments, not extending beyond their own official existence, to fill vacancies that may arise by reason of the death or resignation of clerks transferred with them from the inferior courts. *Id.*

3. *Appointment for Full Term to Fill Vacancy Caused by Resignation of Transferred Clerk.* An appointment of a clerk of the Municipal Court of the city of New York for the third district of the borough of Brooklyn, purporting to be for the full term of six years, made, upon the resignation of the clerk transferred with him, within two days before the expiration of his term, by a justice who had been transferred from an inferior court of the city of Brooklyn, is not a valid and



**COURTS — Continued.**

effective appointment for a full term of six years and is void since such justice was not a justice of the Municipal Court either by election or appointment and had no power to appoint a clerk except such as he possessed before the enactment of the charter. *Id.*

4. *Municipal Court of the City of New York is not a new Local and Inferior Court — Jurisdiction over Foreign Corporations — Constitution, Art. 6, § 18.* The Municipal Court of the city of New York is a continuation, consolidation and reorganization of the District Courts of the old city of New York and the Justices' Courts in the first, second and third districts of the old city of Brooklyn under a new name, and is not a new local inferior court within section 18 of article 6 of the Constitution authorizing the legislature to establish inferior local courts, but prohibiting it from "hereafter" conferring upon any inferior local court of its creation any equity jurisdiction or any greater jurisdiction in other respects than is conferred upon County Courts by or under "this" article; and the provision of section 1364 of "the Greater New York charter," that such court shall have jurisdiction "of a foreign corporation having an office in the city of New York," does not violate such constitutional provision, but merely confers upon the Municipal Court the jurisdiction which had been exercised for many years by the local tribunals consolidated in that court. *Worthington v. London G. & A. Co.* 81

5. *Scope of Constitutional Limitation.* Assuming that the Municipal Court of the city of New York is a new local court, the provision conferring upon it jurisdiction "of a foreign corporation having an office in the city of New York" would not violate section 18 of article 6 of the Constitution, since the limitation thereby imposed upon the power of the legislature to confer jurisdiction upon future inferior local courts relates to the jurisdiction as to subject-matter, and not as to territory, non-resident parties defendant or foreign corporations. *Id.*

Duty to render speedy decisions in cases under the Election Law.

*See* ELECTIONS, 3.

**CRIMES.**

1. *Extra Panel of Jurors — Sheriff's Return.* The provision of section 1174 of the Code of Civil Procedure, requiring the sheriff to make return, as prescribed in section 1048, of the persons drawn on an extra panel of jurors, applies to the form and manner of the return and not to the time, since the requirement of section 1048 is that the return be made at or before the opening of the court, which is obviously impossible in case of an extra panel drawn after the commencement of the term; and if the return is actually filed before the court overrules a challenge to the array of the extra panel it is in time. *People v. Lammerts,* 137

2. *Challenge for Cause — Failure to Exhaust Peremptory Challenges.* Defendant in a criminal trial is not harmed by the overruling of challenges to jurors for bias where each of such jurors was subsequently excused under a peremptory challenge and defendant did not exhaust his peremptory challenges. *Id.*

3. *Indictment for Grand Larceny — Omission of Word "Money."* The failure of an indictment for grand larceny, which charges that defendant had in his possession, custody and control, and unlawfully appropriated to his own use, a specified number of dollars and cents, to allege that it was in money is not a fatal defect. *Id.*

4. *Sufficiency of Averment as to Appropriation of Money.* An indictment for grand larceny of money which defendant had in his control as county treasurer sufficiently charges that he appropriated the money to the use of himself where it alleges that he "did then and there with

**CRIMES** — *Continued.*

intent to deprive the true owner of said property and of the use and benefit thereof, and to appropriate to himself \* \* \* wilfully, unlawfully and feloniously appropriate, secrete, withhold, take, steal and carry away;" since, under sections 275, 284 and 285 of the Code of Criminal Procedure, the act charged as a crime is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction according to the rights of the case, and its imperfection is in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits. *Id.*

5. *Variance between Indictment and Proof.* Proof that defendant, as county treasurer, drew a check upon a bank in which money of the county was on deposit subject to his order and control, personally took the same to the bank and exchanged it for a draft payable to a third person to whom he delivered it in satisfaction of a judgment against himself personally, that the draft was subsequently paid and the defendant's account as treasurer charged with the amount of the check is, in effect, proof of an appropriation of the money itself and is not a variance between the proof and the crime charged in the indictment. *Id.*

6. *Evidence — Declarations Made in Presence of Accused Incompetent.* Upon a trial for murder the testimony of a police officer as to a conversation, in the presence of the defendant, who was in custody, between the witness and another person, tending to show that the latter, after being warned by the witness to be careful in his statements, identified the defendant as the person who was with the deceased the night of the homicide, is hearsay and incompetent, notwithstanding that such person is also a witness on the trial and to some extent corroborates the police officer as to his identifying the defendant, where the defendant, when he undertook to speak and deny that he was the person, was instantly stopped by the police officer and required to keep still. *People v. Kennedy.* 449

7. *Admissibility of Declarations Made in Presence of Accused.* Declarations or statements made in the presence of accused are not received as evidence in themselves against him, but for the purpose of ascertaining the reply he makes to them. They are only competent when he hears and fully comprehends the effect of the words spoken and when he is at full liberty to make answer thereto, and then only under such circumstances as would justify the inference of assent or acquiescence as to the truth of the statement, by his remaining silent. *Id.*

8. *Appeal — Granting New Trial in Capital Case for Error not Excepted to.* The power conferred upon the Court of Appeals by section 528 of the Code of Criminal Procedure to order a new trial when the judgment is of death, if satisfied that the verdict was against the weight of evidence, or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below, may be properly exercised when it is apparent that the defendant has suffered gross injustice by the admission of incompetent evidence upon the main and vital issue, even though the defendant's counsel failed to object to its reception; but the provision of the Code was not intended to relieve counsel of the duty of objecting, and, in case their objection is overruled, of taking an exception, to the admission of incompetent evidence. *Id.*

9. *When New Trial Will not be Granted.* The power conferred by that section upon the Court of Appeals is a power to be exercised or withheld in its discretion, and where that court is satisfied that the accused has had a fair trial and that he is guilty of the crime charged, a new trial will not be granted. *Id.*

10. *Murder — Questions of Fact.* The question of the credibility of the People's witnesses in a trial for murder, and the question whether the decedent was killed by the defendant, and if so, whether the act was

**CRIMES — Continued.**

committed under circumstances constituting the crime of murder in the first degree, are clearly for the jury, where, if such witnesses are to be believed, there is not only ample proof of circumstances tending to show that the decedent was killed by the defendant, but there is direct proof to the same effect. *People v. Priori.* 459

11. *Duty of Court to Sustain Privilege of Witness.* Where, under the circumstances, the trial court is justified in informing a witness called by the defendant of his constitutional privilege to decline to answer any question that would tend to incriminate or degrade him, and it is manifest that he personally declined to answer upon such grounds, it is its duty to sustain his privilege, if the evidence on his examination as a witness would either tend to incriminate him or disclose a link in the chain of testimony which might convict him of crime, and he is not required to explain how he might be incriminated by the answer; and before the defendant can claim its ruling to be erroneous, he must at least show such facts as will render it clear that an answer to the question propounded would not incriminate or disgrace the witness. *Id.*

12. *When Error in Sustaining Witness' Claim of Privilege not Prejudicial.* Sustaining the claim of privilege, interposed by a witness brought into court from prison, to a question asked him by defendant in a murder trial, as to whether he heard a witness for the state say to defendant while in the prison that he knew nothing about the case, even if error, is not ground for reversing a conviction where the witness for the state had admitted that he made such a statement to the defendant, and that fact is undisputed. *Id.*

13. *Declarations by District Attorney as to the Law of the Case.* The misconduct of the district attorney in assuming to state the law upon the question of premeditation and deliberation, and in persisting in making such statements after the court had instructed him not to continue the discussion, is not sufficient cause for reversal of a conviction, where the court distinctly and plainly instructed the jury upon the question of premeditation and deliberation, and also instructed it to disregard any matter that had been stated as to the law, or what the law should be, and any statements made in regard to any opinions or decisions of the courts, except such as should be made by the trial judge. *Id.*

14. *Improper Comments by District Attorney.* Statements by the district attorney in his address to the jury as to the law of defendant's native country, to the effect that the crime of murder was less seriously punished in that country, are rendered harmless, and should be disregarded by the Court of Appeals, where the district attorney withdrew his remarks on that subject, when the defendant objected to them, and the court expressly directed the jury to disregard them. *Id.*

15. *Comments on Defendant's Failure to Testify.* Any error resulting from comments by the district attorney, upon the failure of defendant in a murder trial to testify in his own behalf, is cured where the trial court, at the defendant's request, calls the attention of the jury to the provisions of section 398 of the Code of Criminal Procedure, and charges them that while the defendant in all cases may testify in his own behalf, still, his neglect or refusal to do so does not create any presumption against him. *Id.*

16. *Misconduct of Jury in Murder Trial—When Refusal of New Trial Justified.* The trial court is justified in denying an application for a new trial made by defendant in a murder trial, so far as it is based upon the ground that during the trial one of the jurors had a copy of the Penal Code and Code of Criminal Procedure which he read and exhibited to some of his fellows, where it is obvious that he obtained the book inadvertently, and as soon as the attention of the prosecution was called to

**CRIMES** — *Continued.*

the fact the book was taken away from him, and the defendant omitted to raise any objection, or make any request to the court to specially instruct the jurors to disregard anything that had been read, and it is not alleged or set forth what was read, or that it had any connection with, or bearing upon, the case, or in any way affected the verdict, and the court in effect charged the jury that it was to receive the law as the court declared it, independent of any knowledge it might otherwise acquire. *Id.*

17. *New Trial on Ground of Newly-discovered Evidence.* An application for a new trial in a murder case, upon the ground of newly-discovered evidence, may properly be refused where the new evidence is not such as requires the trial court to hold that it would probably change the result if a new trial were granted, or where there is not sufficient proof that it could not have been discovered before the trial by the exercise of due diligence. *Id.*

Non-reviewable order of reversal.

See **APPEAL**, 1.

**DAMAGES.**

1. *Distribution of Damages Recovered in Action for Causing Death by Negligence* — *Code of Civil Procedure*, §§ 1902 *et seq.* The provisions of the Code of Civil Procedure (§§ 1902 *et seq.*) authorizing the maintenance of an action where a decedent's death was caused by a wrongful act, neglect or default and providing for the distribution of the damages recovered, were intended by the legislature to create a new cause of action for the benefit, as a class, of the husband or wife and next of kin, and when the class consists of the widow and the father only, the latter is, under section 2732, subdivision 7, entitled to share equally with the widow in a judgment which she has recovered for her husband's death by negligence, proper deduction being made for the expenses of her action and her commissions upon the recovery as his administratrix. *Matter of Snedeker v. Snedeker.* 58

2. *Measure of, for Cutting Timber Resulting in Injury to the Freehold.* Where the defendant under a contract with the plaintiff was entitled to cut certain timber upon the premises of the latter, and unlawfully cuts other timber, both on land covered and land not covered by the contract, to the injury of the freehold, the measure of damages is the difference between the value of the land after defendant has cut the timber which it was entitled to cut and its value after all the unauthorized cutting. *Diebrock v. Westchester Hardwood Co.* 415

3. *Separate Recovery for Value of Timber Cut, Erroneous.* Where the cutting of timber from lands not embraced within the terms of the contract is an injury to the freehold and a recovery is had therefor, an additional recovery for the value of the timber cut cannot be upheld. *Id.*

4. *Contract to Furnish Goods — Measure of Damages for Breach of.* A contract to furnish at least \$1,000 worth of cigarettes a year, plus two per cent of that sum, is implied by an agreement for a term of five years, executed between a cigarette manufacturer and certain dealers, providing that the former shall allow the latter \$1,000 per annum to be deducted in equal monthly installments from current bills, and shall make a further allowance of two per cent below the price given to any other house in the states of New York and New Jersey on a certain brand of cigarettes, in consideration of which the dealers bind themselves to "push" that brand of cigarettes and not to push other brands, and the measure of damages for the breach of such implied contract by the manufacturer's refusal to furnish the cigarettes is the difference between the amount the dealers were to receive in case they performed the contract and the cost of performance. *Ellis v. Miller.* 434

**DAMAGES** — *Continued.*

Distribution of damages recovered in action for causing death.

*See NEGLIGENCE, 2.*

For breach of contract to furnish goods.

*See CONTRACT, 5.*

**DECLARATIONS.**

Made in presence of accused.

*See EVIDENCE, 10, 11.*

**DEDICATION OF STREET.**

Acceptance by authorities — new method created by city charter not exclusive.

*See MUNICIPAL CORPORATIONS, 7.*

**DEEDS.**

Action to set aside.

*Disbrow v. Disbrow (Mem.), 564.*

Capacity in which grantees take, when immaterial.

*See EVIDENCE, 13.*

Presumption of delivery from record of deed.

*See EVIDENCE, 14.*

**DEMURRER.**

When must be taken to defect of parties.

*See RAILROADS, 2.*

**DIRECTORS.**

Liability to penalty for failure to file annual report.

*See CORPORATIONS, 6-10.*

**DISMISSAL OF APPEAL.**

All grounds must be specified on first motion therefor.

*See APPEAL, 21.*

**DISTRICT ATTORNEY.**

Declaration by, as to law of the case.

*See CRIMES, 13.*

Improper comments by, when cured.

*See CRIMES, 14.*

Comments on defendant's failure to testify, when cured.

*See CRIMES, 15.*

**EASEMENTS.**

*When Nons can be Implied for Support, Access and for Use of Water and Sewer Pipes.* Where by mutual conveyances of equal date, with full covenants against all incumbrances and without any reservations, one of two adjoining lots is conveyed to one heir and the other lot to another heir, there is no implied easement, in favor of either lot against the other, for support of, or access to, a frame building standing at the time of the ancestor's death, and covering about eight feet of each lot, it being under the same roof as houses on either side, from which it was separated by studding partitions, its chimney standing on the line between the two lots and its entrance being entirely on one of them; nor is there any implied easement as to a common sewer running along the dividing line, or as to a water supply pipe for said building coming through one of the lots, in the absence of a finding that it was necessary that they should pass through one of the lots in order to reach and serve the other. *Whyte v. Builders' League.*

**ELECTIONS.**

1. *Residence of Voters—Seminary Students.* Under section 3 of article 2 of the Constitution of the state of New York, residence for the purpose of voting is neither gained nor lost by a sojourn in a seminary of learning, and the fact that a student enters a seminary to be educated for a certain calling, and to remain there after graduation until assigned to duty, instead of a fixed course of four years, as is usual in institutions of learning, does not entitle him to vote in the election district in which such seminary is situated. *Matter of Barry.* 18

2. *Election Law—Section 56 Directory not Mandatory.* The provision of the Election Law (L. 1896, ch. 909, § 56, as amd. L. 1898, ch. 335) that a final order of the court reviewing the determinations and acts of the officers with whom certificates of nomination are filed must be made on or before the last day fixed for filing certificates of nominations to fill vacancies, viz., fifteen days before election, is directory and not mandatory, and where the court has acquired jurisdiction and a case has been submitted within the time required by the statute, its order will be effectual although made after the expiration of such time. *Matter of Hennessy.* 393

3. *Duty of Courts to Render Speedy Decisions.* It is the duty of courts and judges entertaining proceedings under the statute to speedily decide the questions presented to them so that the various steps required by officers may be taken in time to permit the carrying into execution its provisions. — *Id.*

**ESTOPPEL.**

When beneficiaries of trust fund are estopped from questioning investment of fund.

*See TRUSTS, 5.*

**EVIDENCE.**

1. *Negligence—Identification of Wrongdoer.* Where, under the maxim *res ipsa loquitur*, injuries, caused by the falling of a brick from a building in process of construction on a public street by nineteen independent contractors employing about two hundred and fifty men, may be presumed to have been the result of negligence, but there is no proof whatever as to who set the brick in motion or from what part of the building it came, the presumption of negligence is not sufficient to sustain a recovery of damages against two of the contractors, one being in charge of the carpenter work and the other of the mason work, since the party responsible for the injury is not identified. *Wolf v. American Tract Society.* 30

2. *Proof of Immaterial Circumstances Incompetent.* Upon the trial of an action by a mill foreman to recover damages for his alleged wrongful discharge from employment, evidence of the amount of defendant's dividends and profits during his employment and for the various years subsequent thereto and up to the trial, with a view of showing that the profits did not greatly vary during that time, is not competent for the purpose of contradicting defendant's testimony tending to show his incompetency, to the effect that the output of the mill, under conditions otherwise the same, greatly increased after his discharge, since the amount of defendant's profits was not material upon the question of his competency, and the reception of such evidence is reversible error. *Peck v. Dexter & P. Co.* 127

3. *Parol Evidence to Sustain Agreement for Extra Compensation to Assignee for Creditors.* Parol proof tending to show that the extra compensation to an assignee for creditors, stipulated for in a writing executed by the assignor after the assignment, was reasonable or proper, is wholly inadmissible in determining whether the agreement to pay the extra compensation is valid in its general scope and purpose, since the law impressed upon the paper, as soon as it was made and delivered, a legal character

**EVIDENCE — Continued.**

which followed it for all time without regard to the opinion which the assignee or his witnesses had with respect to its operation, whether fair and reasonable or otherwise. *Carpenter v. Taylor.* 171

4. *Admissibility of Statement Tending to Show Understanding of Parties as to Meaning of Contract.* A statement by plaintiff's duly authorized agent, when making a contract of sale, that he had no doubt that the shipment could be made during specified months, may be considered by the jury in determining what was a reasonable time in which to make the shipment, since it would show about what the parties understood it to be, although it would not fix the exact time. *Eppens, Smith & Wiemann Co. v. Littlejohn.* 187

5. *When Admissible although not Pleaded.* Where promissory notes are executed by the maker pursuant to the terms of a written agreement for the sale of stock of a corporation, which was the consideration for the notes, and which agreement bound him to deliver them to the payee, and the former delivers them to a third person, and the defense in an action for damages for non-delivery of two of the notes is that the delivery to the third person was by plaintiff's direction, and defendant has testified to such direction, although not pleaded, evidence is admissible of a parol agreement between the plaintiff and such third person that the latter should receive the notes in suit as indemnity for an undertaking by him and another as sureties for plaintiff and also to show the extent of that liability and how plaintiff's sale of the stock without some resulting indemnity would increase the risk assumed by the sureties, since it is a circumstance corroborative of the evidence supporting the real defense. *Stokes v. Polley.* 286

6. *When Parol Evidence not an Attempt to Vary Writing.* Where the written agreement provided that certain of the notes covered thereby should be deposited by the plaintiff with a trust company to indemnify the third person and others as sureties upon an undertaking in plaintiff's behalf, but left him in full control of the remaining notes, including those in suit, and they are delivered to such third person, evidence of such parol agreement is not an attempt to vary the written agreement by parol evidence. *Id.*

7. *Facts Insufficient to Take Case from Jury.* Where the notes were delivered to such third person under the claim that the delivery was by plaintiff's direction, the facts that an alteration made in them as a correction was made without plaintiff's consent and for that reason they were returned to the defendant who replaced them by new notes correctly drawn, and that after the first delivery and before such replacement the alleged authority for delivery to the third person was revoked by the plaintiff, are not sufficient to justify the court in taking from the jury the issue of fact whether the original delivery was by plaintiff's authority and before the notice of its revocation. *Id.*

8. *Similar Contracts by Agent.* In an action against a carrier where the defense is that its agent had no authority to make the contract without requiring a declaration of the value of the goods, evidence that the agent had made contracts with other parties, dispensing with such declaration, before and at the time of the alleged contract with plaintiff, is admissible as direct evidence for the purpose of defining the contract as actually made. *Louenstein v. Lombard, Ayres & Co.* 324

9. *When Oral Negotiations are not Merged in Written Instrument.* Where a contract for shipment is made by an intending consignee with the carrier's agent in one place, and his consignor at another place, pursuant to the consignee's instructions, ships the goods at such other place, the bill of lading given by the carrier to the consignor at the latter place does not constitute the contract between the carrier and consignee. *Id.*

**EVIDENCE — Continued.**

and the rule that oral negotiations are merged in the written instrument  
*Id.*

10. *Homicide — Admissibility of Declarations Made in Presence of Accused.* Upon a trial for murder the testimony of a police officer as to a conversation, in the presence of the defendant, who was in custody, between the witness and another person, tending to show that the latter, after being warned by the witness to be careful in his statements, identified the defendant as the person who was with the deceased the night of the homicide, is hearsay and incompetent, notwithstanding that such person is also a witness on the trial and to some extent corroborates the police officer as to his identifying the defendant, where the defendant, when he undertook to speak and deny that he was the person, was instantly stopped by the police officer and required to keep still.  
*People v. Kennedy.* 449

11. *Admissibility of Declarations Made in Presence of Accused.* Declarations or statements made in the presence of accused are not received as evidence in themselves against him, but for the purpose of ascertaining the reply he makes to them. They are only competent when he hears and fully comprehends the effect of the words spoken and when he is at full liberty to make answer thereto, and then only under such circumstances as would justify the inference of assent or acquiescence as to the truth of the statement, by his remaining silent.  
*Id.*

12. *Book Entries not Made by Witness.* Upon the question as to the amount for which checks, subsequently raised, were originally drawn, in an action between the depositor and the bank, entries made in his cash book by his bookkeeper, who is not a witness, are admissible where it appears from the plaintiff's testimony that in the course of his business the entries were made from memoranda to which he could testify from memory, and that they correctly stated the amounts for which the checks were drawn, the entries being compared by him with the memoranda after the checks were drawn, and in each case found to be correct, the memoranda being then destroyed. *Clark v. Nat. Shoe & Leather Bank.* 498

13. *Evidence as to Capacity in which Grantees Take, when Immaterial.* The rejection of a certified copy of the inventory of an estate filed by executors, upon the question whether they took as executors, or as tenants in common in their own right, under a deed executed to them, is not reversible error in an action to compel the determination of an adverse claim of title based on such deed, where, in either event, such deed conveyed no title as against the title under which the plaintiff claims. *Sweetland v. Buell.* 541

14. *Presumption of Delivery from Record of Deed.* The fact that deeds are recorded raises the presumption that they were recorded by the grantee, and proof of that fact is *prima facie* and presumptive evidence of delivery.  
*Id.*

Admissibility of statements as to meaning of contract.

*See SALES, 6.*

Burden of proof in action by assignee of claim assigned as collateral security.

*See ASSIGNMENT, 3.*

Exceptions in capital case.

*See APPEAL, 16.*

Findings of fact unanimously affirmed cannot be questioned by Court of Appeals as against or without.

*See APPEAL, 2.*



**EVIDENCE**— *Continued.*

Insured's refusal to answer questions—mixed questions of law and fact.

*See* INSURANCE, 5.

Similar contracts by agent.

*See* PRINCIPAL AND AGENT, 4.

Tending to contradict or impeach witness.

*See* WITNESS, 1.

Variance between indictment and proof.

*See* CRIMES, 5.

**EXTRA ALLOWANCE.**

May be allowed when plaintiff recovers less than fifty dollars.

*See* COSTS.

**FEEs.**

Of assignee for creditors.

*See* ASSIGNMENT, 8.

**FINDINGS.**

Construction of.

*See* APPEAL, 23.

**FINES.**

When payment by one defendant of fine imposed upon several defendants for civil contempt, is satisfaction for all.

*See* CONTEMPT.

**FORECLOSURE.**

Modification of decree distributing surplus.

*See* APPEAL, 3.

**FRAUD.**

Facts insufficient to establish fraud and entitle vendor to rescind sale.

*See* SALES, 7.

**FRAUDS (STATUTE OF).**

When question as to whether a contract is void under, is not reviewable.

*See* APPEAL, 6.

**GAME LAW.**

1. *Possession of Fish Inhibited Thereby During Close Season.* The prohibition against the possession of certain fish during the close season contained in the Fisheries, Game and Forest Law (L. 1892, ch. 488, §§ 110, 112, as amd. by L. 1896, ch. 581 and L. 1898, ch. 109) applies only to such fish as are taken from the waters of this state and not to those imported from a foreign country; and the mere possession of fish of the species inhibited, by any person within this state, during the close season, is not in itself a violation of the law, although it is *prima facie* evidence thereof and casts upon him the burden of proving facts showing his possession to be lawful. *People v. Buffalo Fish Co.* 93

2. *Section 246 Applicable only to Criminal Offenses.* Section 246 of the Game Law (L. 1892, ch. 488), providing that any magistrate having criminal jurisdiction, on proof by affidavit that any of the provisions of that statute have been violated by any persons temporarily within his jurisdiction, but not residing there permanently, or by any person whose name and residence are unknown, shall issue his warrant for the arrest of such offender and cause him to be committed to bail to answer the charge against him, applies only to criminal offenses under

**GAME LAW — Continued.**

the statute, and does not authorize the arrest of a person charged with its violation by trespassing and fishing upon a private park established thereunder where the statute imposes only exemplary damages in addition to actual damages for such violation and no provision thereof made such trespass criminal at the time of his arrest. *Stahl v. Roof*. 163

**GUARDIAN AND WARD.**

Liability of sureties on guardian's bond.

*See* PRINCIPAL AND SURETY, 1.

When accounting of guardian not a condition precedent to equitable suit against sureties.

*See* PRINCIPAL AND SURETY, 2.

**HIGHWAY.**

When railroad company may not change line of highway crossing its track.

*See* RAILROADS, 4, 5.

**HUSBAND AND WIFE.**

*Action to Annul a Marriage — Power of Supreme Court to Grant Alimony and Counsel Fees.* The Supreme Court, in an action against a wife to annul a ceremonial marriage, has, in a proper case, as an incident to its jurisdiction to entertain the action, power to grant alimony and counsel fees *pendente lite*, although the provisions of the Code of Civil Procedure (§§ 1742 *et seq.*) authorizing and regulating actions to annul a marriage are silent as to alimony and counsel fees. *Higgins v. Sharp*. 4

**INDICTMENT.**

For grand larceny — omission of word "money."

*See* CRIMES, 3.

Sufficiency of averment as to appropriation of money.

*See* CRIMES, 4.

Variance between indictment and proof.

*See* CRIMES, 5.

**INDORSER.**

Liability for indorsement before delivery to payee.

*See* BILLS, NOTES AND CHECKS, 1.

Presumption as to liability arising from face of note, when not conclusive.

*See* BILLS, NOTES AND CHECKS, 2.

**INSURANCE.**

1. *Mutual Fire Insurance Company — Cash Policyholders Entitled to Vote at Election of Directors.* Holders of policies in a mutual fire insurance company, organized under chapter 239 of the Laws of 1836, as amended by chapter 47 of the Laws of 1848, who have paid a certain definite sum of money in full for insurance therein, in lieu and in place of a premium note therefor, are as fully and effectively insured as those who have given a premium note for insurance and are members of the company and entitled to vote at any election of its directors equally with note policyholders. *Matter of Mutual F. Ins. Co.* 10

2. *Fire Insurance — Compliance with Agreement for Appraisal a Condition Precedent to Action upon Policy.* Where, in pursuance of the provisions of the standard fire insurance policy, the parties have entered into a written agreement to submit to appraisers the amount of a loss, both parties are equally bound to act in good faith to accomplish the appraisal, and where the insured, beyond the appointment of an

**INSURANCE—Continued.**

appraiser, has taken no steps to render it effective and there is no evidence that the insurer, either in the execution of the agreement or for the purpose of defeating its object, has acted in bad faith, the former will not be absolved from compliance with its terms and justified in abandoning the proceedings and resorting to an action to recover the amount of the loss. *Silver v. Western Assur. Co.* 881

3. *Validity of a Voluntary Agreement by a Foreign Insurance Company Creating a Fund for the Benefit of Policyholders.* An agreement between a foreign insurance company and an agent representing it in the state, whereby sixty per cent of the net premiums received by the latter for insurance were to be deposited in trust for the benefit of such persons in the United States as shall effect insurance in the company through his office, is not invalid as against policyholders not beneficiaries thereunder, in the absence of fraud or some positive law forbidding it. *Babcock P. P. Mfg. Co. v. Ranous.* 443

4. *Effect of Attaching Fund as Waiver of Right to Assert Trust Therein.* Policyholders who are the beneficiaries of such trust fund do not waive their rights as beneficiaries as against an attaching creditor of the insurance company by themselves attaching the fund subsequently to his attachment. *Id.*

5. *Fire Insurance—Insured's Refusal to Answer Question—Materiality of Question a Mixed Question of Law and Fact.* The materiality, upon the question of the actual cash value of an insured steamer at the time of its destruction by fire, of the inquiry, made of insured pursuant to a provision of the policy requiring them to submit to an examination under oath, as to the amount they paid for it, is a question of fact or a mixed question of fact and law, when the refusal to answer the inquiry is relied upon as a defense to an action on the policy, where they purchased the steamer from a third person who purchased it, with other property, at a receiver's sale, and they expended \$3,500 upon it after they became the owners. *Porter v. Traders' Ins. Co.* 504

6. *Mistake as to Materiality.* The provision of an insurance policy that the insured shall submit to examination under oath, does not bind them to answer every question propounded, however irrelevant; and if, acting in good faith, they make a mistake in deciding that an inquiry in respect to the price paid for insured property is not, under the circumstances, material on the question as to its cash value at the time of the fire and refuse to answer it, it is not ground for visiting them with a forfeiture of the benefits under the policy. *Id.*

7. *Construction of Provision Requiring Insured to Submit to Examination under Oath.* A provision of an insurance policy, the object of which is to prescribe the manner in which an accrued loss is to be adjusted and ascertained, that the insured shall submit to examination under oath, is not to be subjected to any narrow or technical construction, but is to be construed liberally in favor of the insured. *Id.*

**INTERMEDIATE ORDER.**

Order denying motion for a new trial upon the minutes.

*See* APPEAL, 14.

Remittance of case for consideration of Appellate Division.

*See* APPEAL, 14.

**JUDGMENT.**

1. *New York City—Unauthorized Offer of Judgment by Corporation Counsel—Taxpayer's Action.* The corporation counsel of the city of New York has no power, either by virtue of his retainer or under the charter (L. 1897, ch. 378, § 255), to make an offer of judgment in

**JUDGMENT** — *Continued.*

an action against the city, and his affidavit under section 740 of the Code of Civil Procedure that he is duly authorized to make it in behalf of the party, is "an illegal official act" within the clear wording of the statute (L. 1892, ch. 301), authorizing a taxpayer to bring an action "to prevent any illegal official act on the part of any officer of any \* \* \* municipal corporation in the state," and an action may be maintained thereunder to restrain the judgment creditors from collecting and the comptroller from paying a judgment entered upon such offer. *Bush v. O'Brien.* 205

2. *Lien of, as against a Bona Fide Purchaser without Notice before Docket.* Under sections 1 and 3 of chapter 50 of 1 Revised Laws of 1813, no judgment affecting any lands, tenements, real estate or chattels real had any preference until the record thereof had been filed and docketed as against a bona fide purchaser of such real property for a valuable consideration, and a deed given by the judgment debtor for a consideration expressed therein upon the day judgment was entered, without proof that the judgment was entered first, or that the purchaser had actual or constructive notice thereof, is valid as against the judgment. *Sweetland v. Buell.* 541

Modification of, distributing surplus in foreclosure proceedings.

*See* APPEAL, 3.

Reversal of judgment dismissing complaint.

*See* APPEAL, 13.

**JURY.**

Extra panel of jurors — sheriff's return.

*See* CRIMES, 1.

Challenge for cause — failure to exhaust peremptory challenges.

*See* CRIMES, 2.

Facts insufficient to take case from.

*See* EVIDENCE, 7.

Misconduct of, in murder trial.

*See* CRIMES, 16.

**LABOR LAW.**

Liability of master to servant thereunder.

*See* NEGLIGENCE, 5.

**LANDLORD AND TENANT.**

*Covenant for Renewal on Expiration of Term — Payment of Rent while Holding Over.* A lessee, at the expiration of the term under a lease for a term of years containing a covenant on the part of the lessor that at such expiration the lessee shall be paid the appraised value of the building or a new lease granted at an appraised rental, is entitled to retain the possession until the covenant shall be performed by the lessor, and is liable for no more than the rent originally reserved while thus continuing in possession. *Van Beuren v. Wotherspoon.* 363

**LIEN.**

Attorney's lien, waiver of.

*See* ATTORNEY AND CLIENT, 2.

**LIMITATION OF ACTIONS.**

*Enforcement of Penalty.* The cause of action to enforce the penalty prescribed for failure to file the annual report of a corporation required by law, on account of a default, made before the maturity of bonds or interest coupons for the amount of which it is sought to hold the directors, accrues at the dates respectively of the maturity of the coupons and the

**LIMITATION OF ACTIONS — Continued.**

bonds, as to the directors then in office; and the liability of a director, whose election and default in filing the report occurs after the maturity of the debt, attaches at the time his default is complete, since the debt is "then existing;" and if the action is begun within three years from the earlier date it is within the limitation prescribed by section 394 of the Code of Civil Procedure. *Morgan v. Hedstrom.* 224

**MANDAMUS.**

To compel restoration of highway under Railroad Law.

See RAILROADS, 1.

**MASTER AND SERVANT.**

1. *Authority of General Superintendent to Employ Foreman.* The general superintendent of a manufacturing company, the by-laws of which provide that he shall perform such duties as the trustees may direct, who has had the general management of affairs left to him without instructions and has hired and discharged employees, is impliedly authorized to make such ordinary contracts as custom and the necessities of the business justify or require, including the employment of a foreman for the term of one year, unless it is shown that such employment is extraordinary or unwarranted by the requirements of the business. *Peck v. Dexter S. P. & P. Co.* 127

2. *Evidence — Proof of Immaterial Circumstances Incompetent.* Upon the trial of an action by a mill foreman to recover damages for his alleged wrongful discharge from employment, evidence of the amount of defendant's dividends and profits during his employment and for the various years subsequent thereto and up to the trial, with a view of showing that the profits did not greatly vary during that time, is not competent for the purpose of contradicting defendant's testimony tending to show his incompetency, to the effect that the output of the mill, under conditions otherwise the same, greatly increased after his discharge, since the amount of defendant's profits was not material upon the question of his competency, and the reception of such evidence is reversible error. *Id.*

Liability of master for injury to servant from latent defect in appliance.

See NEGLIGENCE, 3.

Liability of master to servant for fall of scaffold.

See NEGLIGENCE, 4.

Liability of master under Labor Law.

See NEGLIGENCE, 5.

**MECHANIC'S LIEN.**

1. *Assignment of Mechanic's Lien — Counterclaim or Set-off Available against Assignee — Effect of New Contract between Owner and Assignor.* An owner, who, after the termination of the original building contract without the fault of the builder, and after the latter had commenced an action to foreclose his mechanic's lien and had assigned the lien and cause of action, but without knowledge of the assignment, entered into a new contract with the assignor with reference to the same subject-matter, is not entitled to set off against the assignee any damages arising out of the assignor's failure to perform the new contract, but is entitled to set off whatever he actually paid to the assignor upon the assigned claim, after the assignment, in good faith and without notice. *Lawrence v. Congregational Church.* 115

2. *Waiver of Defect of Parties.* A defect of parties to an action by an assignee of a mechanic's lien to foreclose the same, arising from the failure to join a prior assignee, to whose assignment plaintiff's assignment was expressly subject, is waived where the attention of the trial court is not in any manner or form directed to the point at the trial. *Id.*

**MECHANIC'S LIEN** — *Continued.*

3. *Action by Assignee of Claim Assigned as Collateral Security — State of Accounts — Burden of Proof.* The assignee of a claim under a written assignment which vests the legal title in him, though as security for a debt, is not bound in an action against the debtor to prove the existence of a debt from the assignor to himself, as the state of accounts between the assignor and assignee does not concern the defendant, or, if it does, the burden is upon him to prove such a state of facts as would render the assignment inoperative or reinvest the assignor in equity with the beneficial ownership of the claim. *Id.*

4. *Order Substituting Assignee as Plaintiff — Effect as an Adjudication of Right to Prosecute the Action.* An order, made upon notice to defendant, substituting the assignee of a claim under an assignment as collateral security as plaintiff in place of the assignor is, in effect, an adjudication that the assignee has such an interest in the claim under the assignment as entitles him to prosecute the action. *Id.*

**MONEY HAD AND RECEIVED.**

*Payment of Individual Debt with Corporate Checks by Officer of Corporation — When Payee Chargeable with Notice of Incapacity and Liable to Restoration.* The payee of corporate checks who receives them from the treasurer of the corporation in payment of a debt not owed by the corporation, but in payment of one which he has treated as the treasurer's individual debt, where the latter has no actual or apparent authority to issue such checks either in payment of his own debt or that of a third person, is chargeable with notice of his incapacity to issue them and is bound to inquire as to the real situation, and where he accepts the checks without question and draws the money thereon, he is liable in an action by the corporation to recover the amount paid as money received by him to its use. *Rochester & C. T. R. Co. v. Faviour.* 281

**MONOPOLY.**

Contract tending to create a monopoly void.

*See* CONTRACT, 3.

**MORTGAGE.**

*Covering Real and Personal Estate — Effect of Delay in Filing as Chattel Mortgage on its Validity as Real Estate Mortgage.* The technical or statutory invalidity as a chattel mortgage as against creditors of the mortgagor, of a mortgage covering both real and personal estate due to the delay in filing it as a chattel mortgage, does not affect its validity as a real estate mortgage, where there was no actual fraud attaching to the mortgage in either branch of it, but it was given in good faith for an honest and ample consideration and with no intent to injure, delay or defraud other creditors of the mortgagor. *Chemung Canal Bank v. Payne.* 252

Modification of decree distributing surplus in foreclosure.

*See* APPEAL, 3.

**MUNICIPAL CORPORATIONS.**

1. *Assessment for Local Improvement — Defect Apparent on Face of Proceedings.* If a provision of a municipal charter requiring an assessment for street paving to be apportioned upon the lots of land abutting on the street "according to the number of feet frontage upon the same" be unconstitutional as taking property without due process of law, the invalidity of an assessment made under it is apparent on the face of the proceedings, and an action in equity to set the assessment aside as a cloud on title cannot be maintained. *Conde v. City of Schenectady.* 258

2. *Waiver of Constitutional Objection.* A property owner who signs a petition for a street pavement under a charter which requires the cost to be apportioned among the owners according to frontage, neces-

**MUNICIPAL CORPORATIONS — Continued.**

early asks that the work be done under the statutory rule and thereby waives any right to object to it upon the ground that it constitutes a taking of property without due process of law. *Id.*

3. *Irregularity in Proceedings for Street Improvement Cured by Statute.* An irregularity in a proceeding for a street improvement consisting in the requirement by the common council of two bonds, one to accompany the bid and to be conditioned that if the bid is accepted the bidder will enter into a contract with the city for doing the work, and the other to be executed on the award of the contract and to be conditioned for its performance, instead of following the provision of the charter which requires one bond to be given when the bid is made, and which is to cover not only the execution of the contract but its performance, will not avoid an assessment when another section of the charter provides that "every assessment for the purpose authorized by this title, shall be valid and effectual, notwithstanding any irregularity, omission or error in any of the proceedings relating to the same \* \* \*." *Id.*

4. *Variance between Petition and Ordinance as to Kind of Paving Material.* The variance between a petition for the paving of a street which asked for "Trinidad sheet asphalt" and the ordinance directing the street to be paved with "Asphaltum sheet pavement," the specifications requiring the material to be "refined lake asphalt" and distinctly excepting land or overflow asphalt, does not invalidate an assessment for the pavement even if the term "lake asphalt" is more comprehensive than "Trinidad asphalt" where Trinidad asphalt was actually used and there is no proof to show that the exclusion in the specifications of land and overflow asphalt was improper. *Id.*

5. *City of Schenectady — Expense of Repaving Street Intersections.* The amendment of section 59 of the charter of the city of Schenectady (L. 1890, ch. 294, as amd. by L. 1893, ch. 190), by omitting the provision that the cost and expense of repaving the street intersections should be borne by the city at large, had the effect of imposing the whole cost of repaving a street on the abutting lots. *Id.*

6. *Method of Paying Assessment.* Under section 61 of the charter of the city of Schenectady, the determination whether an assessment for repaving a street shall be payable in installments or not is, in the absence of request by the petitioners for the improvement, vested in the common council. *Id.*

7. *Dedication of Street — Acceptance by Authorities — New Method Created by City Charter not Exclusive.* When a city charter provides a new way of accepting land tendered for a public street, and does not purport to provide an exclusive method of tender and acceptance, it does not preclude existing methods of dedication under the common law, and the courts cannot make a limitation the legislature did not impose, since if an extreme and extraordinary change of the common law had been intended it would expressly appear and not be left to implication. *Matter of Hunter.* 865

8. *Power to Regulate Erection of Billboards.* The power conferred upon the city of Rochester by its charter "to license and regulate billposters \* \* \* and to prescribe the terms and conditions upon which any such license shall be granted \* \* \*" (L. 1880, ch. 14, § 40, subd. 21, as amd., L. 1894, ch. 28, § 9), authorizes an ordinance prohibiting the erection of billboards exceeding six feet in height, except with the permission of the common council, after notice in writing of the application for the permit, to the owners, occupants or agents of all houses and lots within a distance of 200 feet from where such billboard is to be erected. *City of Rochester v. West.* 510

**MUNICIPAL CORPORATIONS — Continued.**

9. *Constitutionality of Charter.* The statute conferring such power on the city, was within the power of the legislature, and is not in conflict with any provision of the State or Federal Constitution. *Id.*

10. *Reasonableness of Ordinance.* Such ordinance is not unreasonable or an undue restraint of a lawful trade or business, nor a restraint upon the lawful and beneficent use of private property. *Id.*

11. *Validity of Statute or Ordinance—General Rule.* The validity of a statute or ordinance is not to be determined from its effect in a particular case, but upon its general purpose and its efficiency to effect that end. When a statute is obviously intended to provide for the safety of a community, and an ordinance under it is reasonable and in compliance with its purpose, both the statute and the ordinance are lawful and must be sustained. *Id.*

**MUNICIPAL WATER WORKS.**

Diversion of sub-surface waters by

*See WATERCOURSES.*

**NEGLECTENCE.**

1. *Identification of Wrongdoer.* Where, under the maxim *res ipsa loquitur*, injuries, caused by the falling of a brick from a building in process of construction on a public street by nineteen independent contractors employing about two hundred and fifty men, may be presumed to have been the result of negligence, but there is no proof whatever as to who set the brick in motion or from what part of the building it came, the presumption of negligence is not sufficient to sustain a recovery of damages against two of the contractors, one being in charge of the carpenter work and the other of the mason work, since the party responsible for the injury is not identified. *Wolf v. Am. Tract Society.* 30

2. *Distribution of Damages Recovered in Action for Causing Death by Negligence—Code of Civil Procedure, §§ 1902 et seq.* The provisions of the Code of Civil Procedure (§§ 1902 et seq.) authorizing the maintenance of an action where a decedent's death was caused by a wrongful act, neglect or default and providing for the distribution of the damages recovered, were intended by the legislature to create a new cause of action for the benefit, as a class, of the husband or wife and next of kin, and when the class consists of the widow and the father only, the latter is, under section 2782, subdivision 7, entitled to share equally with the widow in a judgment which she has recovered for her husband's death by negligence, proper deduction being made for the expenses of her action and her commissions upon the recovery as his administratrix. *Matter of Snedeker v. Snedeker.* 58

3. *Liability of Master for Injury Resulting to Servant from Latent Defect in Appliance.* A master is not liable to a servant for an injury to the latter in consequence of a latent defect in an appliance, where the evidence shows that the material furnished by the master for the manufacture of the appliance, and out of which it was made, was proper; that there was nothing in its appearance to indicate inefficiency, and that it was made by competent and skilled workmen and was subjected to frequent and thorough inspections of such a character as to reveal any flaw or defect that could be discovered in that way. *Smith v. N. Y. C. & H. R. R. Co.* 491

4. *Full of Scaffold—Master's Liability to Servant.* Where a scaffold provided by the master for a servant's use falls, and no other cause of the fall is ascertained except as inferred from the fall itself, the fall is *prima facie* evidence of the negligence of the master in an action by the servant to recover damages received in consequence thereof. *Stewart v. Ferguson.* 553



**NEGLIGENCE** — *Continued.*

5. *Liability of Master under Labor Law.* Where the cause of the fall is otherwise ascertained, sections 18 and 19 of the Labor Law (L. 1897, ch. 415) enlarge the duty of the master, and extend it to responsibility for the safety of the scaffold itself, and thus for the want of care in the details of its construction. *Id.*

Action by sole next of kin.

*See* ABATEMENT.

**NEW TRIAL.**

1. *Misconduct of Jury in Murder Trial — Failure to Make Objection or Prefer Request — When Refusal of New Trial Justified.* The trial court is justified in denying an application for a new trial made by defendant in a murder trial, so far as it is based upon the ground that during the trial one of the jurors had a copy of the Penal Code and Code of Criminal Procedure which he read and exhibited to some of his fellows, where it is obvious that he obtained the book inadvertently, and as soon as the attention of the prosecution was called to the fact the book was taken away from him, and the defendant omitted to raise any objection, or make any request to the court to specially instruct the jurors to disregard anything that had been read, and it is not alleged or set forth what was read, or that it had any connection with, or bearing upon, the case, or in any way affected the verdict, and the court in effect charged the jury that it was to receive the law as the court declared it, independent of any knowledge it might otherwise acquire. *People v. Priori.* 459

2. *New Trial on Ground of Newly-discovered Evidence — When Properly Refused.* An application for a new trial in a murder case, upon the ground of newly-discovered evidence, may properly be refused where the new evidence is not such as requires the trial court to hold that it would probably change the result if a new trial were granted, or where there is not sufficient proof that it could not have been discovered before the trial by the exercise of due diligence. *Id.*

When order of Appellate Division granting new trial not reviewable.

*See* APPEAL, 18.

**NEW YORK (CITY OF).**

1. *Justices Transferred to Municipal Court have no Power to Appoint Clerks Thereof for Full Term.* Justices of the inferior courts of the cities of New York and Brooklyn, in office January 1, 1898, who were transferred to the Municipal Court of the city of New York as justices thereof to serve out their unexpired terms, have no power to appoint clerks of that court for terms of six years conferred by the new charter (L. 1897, ch. 378, § 1373) upon justices "elected or appointed as hereinbefore provided," since the words "elected or appointed" refer only to justices to be elected or appointed after the charter went into effect. *Stuber v. Coler.* 22

2. *Power of Transferred Justices to Fill Vacancies in Office of Transferred Clerks.* The transferred justices, having had power under the old system to supply themselves with clerks, may make appointments, not extending beyond their own official existence, to fill vacancies that may arise by reason of the death or resignation of clerks transferred with them from the inferior courts. *Id.*

3. *Appointment for Full Term to Fill Vacancy Caused by Resignation of Transferred Clerk.* An appointment of a clerk of the Municipal Court of the city of New York for the third district of the borough of Brooklyn, purporting to be for the full term of six years, made, upon the resignation of the clerk transferred with him, within two days before the expiration of his term, by a justice who had been transferred from an inferior court of the city of Brooklyn, is not a valid and effective appointment for

**NEW YORK (CITY OF)**—*Continued.*

a full term of six years and is void since such justice was not a justice of the Municipal Court either by election or appointment and had no power to appoint a clerk except such as he possessed before the enactment of the charter. *Id.*

4. *Civil Service—Tenure of Probationary Appointee.* Where one has been appointed to a position in the civil service of the city of New York for a probationary term, as prescribed by the civil service rules of that city, he cannot be removed during such term except for cause after an opportunity to explain, and a rule providing for his peremptory discharge during the term, without notice of charges or an opportunity to be heard, is invalid, and his peremptory discharge thereunder unlawful. *People ex rel. Kastor v. Kearny.* 64

5. *Municipal Court of the City of New York is not a new Local and Inferior Court—Jurisdiction over Foreign Corporations—Constitution, Art. 6, § 18.* The Municipal Court of the city of New York is a continuation, consolidation and reorganization of the District Courts of the old city of New York and the Justices' Courts in the first, second and third districts of the old city of Brooklyn under a new name, and is not a new local inferior court within section 18 of article 6 of the Constitution authorizing the legislature to establish inferior local courts, but prohibiting it from "hereafter" conferring upon any inferior local court of its creation any equity jurisdiction or any greater jurisdiction in other respects than is conferred upon County Courts by or under "this" article; and the provision of section 1364 of "the Greater New York charter," that such court shall have jurisdiction "of a foreign corporation having an office in the city of New York," does not violate such constitutional provision, but merely confers upon the Municipal Court the jurisdiction which had been exercised for many years by the local tribunals consolidated in that court. *Worthington v. London G. & A. Co.* 81

6. *Scope of Constitutional Limitation.* Assuming that the Municipal Court of the city of New York is a new local court, the provision conferring upon it jurisdiction "of a foreign corporation having an office in the city of New York" would not violate section 18 of article 6 of the Constitution, since the limitation thereby imposed upon the power of the legislature to confer jurisdiction upon future inferior local courts relates to the jurisdiction as to subject-matter, and not as to territory, non-resident parties defendant or foreign corporations. *Id.*

7. *Civil Service—Summary Removal of Employees.* Employees transferred to departments of the city of New York pursuant to section 1336 of the Greater New York charter (L. 1897, ch. 378), who were not subject to removal, without cause, before the transfer, are given the same security of tenure they previously enjoyed, but employees who, before the transfer, were removable at the pleasure of the appointing power may be discharged without cause by the head of the department to which they have been transferred. *People ex rel. Percival v. Cram.* 166

8. *Dockmasters are Public Officers.* Dockmasters in the department of docks in the city of New York are public officers and not merely clerks or employees, since the captain and harbor masters of the port, to whose functions they succeeded, were unquestionably public officers, and dockmasters are recognized as officers by section 848 of the charter providing that a dockmaster "shall not appoint any deputy, or assistant, or delegate the powers of his office to any person or persons whatever." *Id.*

9. *Validity of Rule Prohibiting Summary Removals.* Rule 42 of the regulations of the municipal civil service commission of the city of New York, forbidding the removal of any person in the classified service until a statement of the causes of removal has been filed with the commission and a copy of the same furnished to the person sought to be

**NEW YORK (CITY OF),—Continued.**

removed, and until such person has been afforded an opportunity to present an explanation in writing, is invalid, so far as it applies to a public officer, *e. g.*, a dockmaster in the department of docks, whose term is not prescribed, since article 10, section 3, of the Constitution provides that when the duration of an office is not provided by the Constitution, it may be declared by law, and if not so declared shall be held during the pleasure of the authority making the appointment; and, assuming that such was the statutory intent, the legislature cannot delegate its power to prescribe the duration of term and permanence of tenure of public officers to the civil service commission, nor can the term of an office be prescribed by its regulation. *Id.*

10. *Unauthorized Offer of Judgment by Corporation Counsel—Taxpayer's Action.* The corporation counsel of the city of New York has no power, either by virtue of his retainer or under the charter (L. 1897, ch. 378, § 255), to make an offer of judgment in an action against the city, and his affidavit under section 740 of the Code of Civil Procedure that he is duly authorized to make it in behalf of the party, is "an illegal official act" within the clear wording of the statute (L. 1892, ch. 301), authorizing a taxpayer to bring an action "to prevent any illegal official act on the part of any officer of any \* \* \* municipal corporation in the state," and an action may be maintained thereunder to restrain the judgment creditors from collecting and the comptroller from paying a judgment entered upon such offer. *Bush v. O'Brien.* 205

11. *Taxpayer Cannot Interpose and Appeal in Action against the City.* A taxpayer has no right to interpose and appeal in an action in which a person has obtained a judgment against a city on a claim for damages. *Id.*

12. *Taxpayer's Action to Restrain Illegal Official Act—Proof Required.* In order to maintain a taxpayer's action to restrain the collection and payment of a judgment entered against the city on an offer of judgment by the corporation counsel, upon the ground that his affidavit that he was duly authorized to make such offer was an illegal official act, it is not necessary for the plaintiff to show that the city was not justly indebted in the amount stated in the judgment, since the action is brought under the provision of the statute authorizing a taxpayer's action to prevent an "illegal official act" and not under the provision authorizing an action "to prevent waste." *Id.*

13. *Appeal—When Question is not Academic.* An enactment by the legislature prohibiting in express terms the corporation counsel of the city of New York from making an offer of judgment against the city, does not render the question of the power of a corporation counsel to confess judgment academic as to cases arising prior to its passage or as to cases arising in other cities of the state. *Id.*

14. *Fire Department Fund for Benefit of Widows and Orphans.* A member of the fire department of the borough of Brooklyn, who is within the provision of law for the creation of an insurance fund for the benefit of widows and orphans of its members (L. 1888, ch. 583, tit. 13, § 15; as amended, L. 1889, ch. 153; L. 1897, ch. 378, § 791), may not, on retiring from its membership and becoming a pensioner, have his name taken from the list of subscribers to that fund, and the amount of his contribution, as prescribed by the statute, should be deducted from his monthly pension, notwithstanding his name is stricken from the list and he ceases to be a contributor. *Matter of Tobin.* 532

15. *Rights of Widow of Retired Fireman in Fund.* The widow of a retired fireman who at the time of his retirement had rights in such fund is entitled to its benefits although after his retirement he requested his name to be taken from the list of subscribers and voluntarily ceased to be a contributor. *Id.*

**NOTICE.**

Of limitation upon agent's authority,

See PRINCIPAL AND AGENT, 2, 3.

**NUISANCE.**

1. *Platform wholly within Municipal Stoop Limit not a Nuisance per se.* A permanent iron platform wholly within the stoop limit prescribed by the city of New York, having steps at either end at which persons may enter the building to which it is attached, is not a nuisance *per se.* *Murphy v. Leggett.* 121

2. *Reasonable Use of Platform a Question of Fact—When Use Constitutes a Nuisance and Becomes the Proximate Cause of Injury.* The reasonable use of such platform for the purpose of unloading goods thereon, thereby obstructing the sidewalk in front, is ordinarily a question of fact, depending upon the use being temporary and necessary, having reference to time, place and circumstances, and where it is unreasonable it becomes a nuisance, and a person who, in seeking to avoid the obstruction, passes over the platform, slips on the muddy steps thereof and is injured, while the muddy steps are the direct, the nuisance is the proximate cause of the injury, and a recovery of damages against the party creating it will be sustained. *Id.*

**ORDER.**

Non-reviewable order of Appellate Division granting new trial.

See APPEAL, 18.

Of substitution — effect of order on adjudication of right to prosecute action.

See MECHANIC'S LIEN, 4.

**ORDINANCES.**

Validity of, general rule.

See MUNICIPAL CORPORATIONS, 11.

**PARTIES.**

Effect of order of substitution of.

See ASSIGNMENT, 4.

Waiver of defect in parties.

See MECHANIC'S LIEN, 2.

RAILROADS, 2.

**PARTNERSHIP.**

*Liability of Partner on Firm Note Given for Purchase of Property.*

Where one of two partners engaged in the bicycle business gave the firm note in part payment of the purchase price of a cement business, the fact that the purchase was made without the knowledge or consent of the other partner does not release the latter from liability when it does not appear that the purchase was made by or for any other person than the firm, or for any other purpose than that of the firm, and it does not appear that he never ratified it or that the firm never took over the new business. *Ketcham National Bank v. Hagen.* 446

Unlawful use of designation "& Co."

See PENAL CODE.

**PAYMENT.**

Of individual debt by corporation note.

See CORPORATIONS, 11.

**PENAL CODE.**

§ 363. *Unlawful Use of Designation "& Co."* Where one has no actual partner or partners, the use of the designation "& Co." in the transaction

**PENAL CODE—Continued.**

of his business, in violation of section 363 of the Penal Code, making such use a misdemeanor, could have no operation in the case of an executed agreement. The statute is highly penal and should be strictly construed. *Sinnott v. German-Am. Bank.* 386

**PENALTIES.**

Limitation of action to enforce penalty against directors of corporations.

*See* CORPORATIONS, 7.

**PEREMPTORY CHALLENGES.**

Effect of failure to exhaust.

*See* CRIMES, 2.

**POLITICAL PARTIES.**

*Primary Election Law—Member of General Committee Cannot be Removed by Committee.* A member of the general committee of a political party of a county, who has been duly elected under the provisions of the Primary Election Law (L. 1899, ch. 473), cannot be removed from office as a member of such committee by the committee itself, under any pretext whatever, since it is the manifest intent of the statute that the majority of the primary voters are entitled to select any representative they may desire upon such committee, who shall be responsible to those electing him, and only to them, for his conduct. *People ex rel. Coffey v. Democratic General Committee.* 335

**PRESUMPTION.**

When presumption arising from face of note not conclusive against indorser before delivery.

*See* BILLS, NOTES AND CHECKS, 2.

Presumption of delivery of deed from record thereof.

*See* EVIDENCE, 14.

**PRIMARY ELECTION LAW.**

Member of political general committee cannot be removed by committee.

*See* POLITICAL PARTIES.

**PRINCIPAL AND AGENT.**

1. *Apparent Authority.* A common carrier which is an undisclosed principal and holds out a person as its agent, to whom shippers may apply for rates of freight, thereby clothes him with apparent authority to include in a contract for shipment a provision, usual among carriers at the agent's port, for insurance against all loss without a declaration of the value of the goods although the agent had no authority to make the contract without such declaration, when the shipper has no notice of such limitation upon his authority. *Lovenstein v. Lombard, Ayres & Co.* 324

2. *Notice of Limitation upon Agent's Authority.* Where two persons are held out as agents by an undisclosed common principal in language applying equally to both, the fact that one is an agent at the place where the carrier's main office is located while the other is at a distant and smaller place, is not sufficient to operate as a notice to shippers at the smaller place that the latter agent is subordinate to the former. *Id.*

3. *Carrier's Circular—When not Notice.* A statement on the carrier's circular, "insurance free when valuation declared before the sailing of the steamers," is not notice to an intending shipper that an agent appointed by it to make contracts for shipment has authority to insure only when the value of the shipment is so declared, since the announcement therein is not to be considered as the measure of the agent's authority in the absence of an express statement to that effect, but only as a general rule promulgated by the agent, which does not restrict him from departing from it in a special case. *Id.*

**PRINCIPAL AND AGENT** — *Continued.*

4. *Evidence — Similar Contracts by Agent.* In an action against the carrier where the defense is that its agent had no authority to make the contract without requiring a declaration of the value of the goods, evidence that the agent had made contracts with other parties, dispensing with such declaration, before and at the time of the alleged contract with plaintiff, is admissible as direct evidence for the purpose of defining the contract as actually made. *Id.*

**PRINCIPAL AND SURETY.**

1. *Liability of Sureties on Guardian's Bond.* The fact that money, belonging to the guardian of an infant and paid to the sureties on his bond as security for their liability and deposited by them to the joint account of themselves and the guardian in a trust company, is lost by the failure of the company, does not operate to discharge the sureties from their liability to make good money of the infant received by the guardian and misappropriated by him. *Otto v. Van Riper.* 535

2. *When Prior Accounting of Guardian is not a Condition Precedent to Suit in Equity against Sureties.* Where it is impossible for a ward, by reason of the removal of the guardian to another state and his death there intestate, without leaving any property in either state, to obtain a judicial settlement of the guardian's accounts in a direct proceeding, such settlement is not a condition precedent to a suit in equity against the sureties on the bond for the purpose of having it adjudged whether there was anything due from the guardian to the ward, and, if so, to charge the sureties with the amount. *Id.*

**PROXIMATE CAUSE.**

When use of platform constitutes a nuisance and becomes the proximate cause of injury.

*See* NUISANCE, 2.

**QUESTION OF FACT.**

When question of law depending upon determination of question of fact is not reviewable.

*See* APPEAL, 6, 1b.

When credibility of witnesses and the effect of their testimony is for the jury.

*See* CRIMES, 10.

Reasonable use of platform.

*See* NUISANCE, 2.

Whether use of stream is reasonable.

*See* RIPARIAN RIGHTS, 4.

Waiver of delay in shipment.

*See* SALES, 4.

Whether letter refusing to change method of shipment and fixing limit of time therefor was received and failure to answer was assent thereto, is a question of fact.

*See* SALES, 5.

**QUESTION OF LAW.**

Depending upon determination of question of fact, when not reviewable.

*See* APPEAL, 6.

Reversal presumed to have been made upon.

*See* APPEAL, 8, 10, 12.

Unreasonable use of stream.

*See* RIPARIAN RIGHTS, 5.

**QUESTION OF LAW AND FACT.**

Insured's refusal to answer question upon examination under policy, and materiality of question, is a question of fact or mixed question of law and fact.

*See* INSURANCE, 5.

**RAILROADS.**

1. *Mandamus to Compel Restoration of Highway under the Railroad Law* — *A Proceeding Independent of Remedy for Encroachment Given by Highway and Town Laws and may be Maintained by Private Citizen in the Name of the People.* Mandamus will lie at the instance of a private citizen in the name of the People of the state to compel a lessee railroad company, which has reconstructed a crossing in such manner as to encroach upon a highway, to perform the public duty imposed upon it by section 11 of the Railroad Law (L. 1890, ch. 565) of restoring the highway "to its former state or to such state as not to have its usefulness impaired," and the proceeding is entirely independent of the remedy given by the Highway Law (L. 1890, ch. 568) for the removal of encroachments upon a highway, and sections 15 and 105 relating to notice of, and directions for, their removal and providing, in connection with the Town Law (L. 1890, ch. 569, § 182), that the proceeding must be brought in the name of the town, have no application. *People ex rel. Bacon v. No. Central Ry. Co.* 289

2. *Parties — Waiver of Defect — Demurrer — Code of Civ. Pro. § 2076.* The owner and lessor of the railroad is not a necessary party to the proceeding, and if it were, where the defect of parties appears upon the face of the proceedings and defendant fails to object thereto by demurrer under section 2076 of the Code of Civil Procedure, it is waived. *Id.*

3. *Change of Location and Method of Construction of Railroad Crossing — Necessity for Order of Supreme Court.* Where a railroad company without legal authority has changed its line thirty-five feet to the westward, has crossed the highway at a new point and has constructed a new bridge, the abutments of which encroach upon the highway, instead of being parallel with and on the lines thereof, as the abutments of the old bridge were, it must be treated as an original crossing, which can only be lawfully accomplished by complying with section 11 of the Railroad Law providing that no railroad corporation shall construct its road across, upon or along any highway in a town without an order of the Supreme Court of the district in which such highway is situated, after at least ten days' written notice of intention to make the application for such order shall have been given to the commissioner of highways of the town. *Id.*

4. *When Railroad Company may not Change Line of Highway Crossed by its Track.* The provision of section 11 of the Railroad Law, that "when an embankment or cutting shall make a change in the line of such highway \* \* \* desirable with a view to a more easy ascent or descent, it may construct such highway \* \* \* on such new line as its directors may select, and may take additional lands therefor by condemnation if necessary," applies only where the existence of an embankment or cutting makes a change of grade in the highway desirable, and does not apply where the object is merely to change the highway, at a point where it is crossed by an overhead track, so that it shall approach the underpass formed by the abutments perpendicularly and not obliquely, and, therefore, obviate the necessity of changing the abutments so that they shall not encroach upon the highway; nor does the further provision, to the effect that where a railroad crosses a highway the company shall restore it "to its former state or to such a state as not to have unnecessarily impaired its usefulness," and the highway may be carried under or over the track, confer any power to change its line or to acquire additional lands. *Id.*

**RAILROADS — Continued.**

5. *Power of Court to Authorize Continuance of Abutments Encroaching upon Highway.* The court has no power in a proceeding by mandamus to compel a railroad company to restore a highway at the point of an overhead crossing to such condition as will not impair its usefulness, to make permanent an encroachment of stone abutments upon a highway, provided the route of the highway is changed by acquiring additional land, so that the traveler may pass in safety over a straight course between the abutments, where their construction in that manner was without an order of the Supreme Court, as required by section 11 of the Railroad Law, and was, therefore, illegal *ab initio*. *Id.*

**REAL PROPERTY.**

1. *Abolition of Naked Trust in Real Property by Real Property Law.* The grantee in a deed of absolute conveyance of real property, who executes a contemporaneous declaration of trust in favor of a third person, his heirs, administrators and assigns, declaring that he holds the property in trust for such person for his proper support and maintenance, the rents and profits to be paid to him, and promising upon his demand or that of his heirs, executors, administrators or assigns, to convey the premises to him or them by a good quitclaim deed warranting against all claiming under him (the person declaring the trust), takes a mere naked trust which is abolished by the Real Property Law (L. 1896, ch. 547, §§ 72, 73, 129); and as trustee no legal or equitable estate vests in him, but the fee vests in the person in whose favor the trust is declared. *Wendt v. Walsh.* 154

2. *Appeal — Modification of Decree Distributing Surplus in Foreclosure Proceedings.* The Court of Appeals may, upon appeal from an order of the Appellate Division reversing an order of the Special Term which confirmed the report of a referee in proceedings to distribute the surplus arising upon the foreclosure of a mortgage, modify the order by directing the payment first out of the surplus of an unpaid judgment with interest thereon, against a decedent in whose favor a trust had been declared by a grantee of the premises, but who by virtue of sections 72, 73 and 129 of the Real Property Law took the fee, the mere naked trust being abolished by the statute, although the referee's findings of fact did not include the claim preferred by the judgment creditor, owing to the fact that the referee held that the decedent never had title to the property, and although the order of the Appellate Division distributed the surplus among the children of the decedent, ignoring the judgment creditor's claim. *Id.*

**RECOVERY.**

Assumption on appeal as to theory of.

*See* APPEAL, 9.

**REMAINDERS.**

Vested or contingent.

*See* WILL, 1.

**REQUEST TO CHARGE.**

Refusal of.

*See* TRIAL, 2.

**REVERSAL.**

Presumed to have been made upon questions of law

*See* APPEAL, 8, 10, 12.

By Appellate Division without awarding new trial.

*See* APPEAL, 11.

**RIPARIAN RIGHTS.**

1. *General Rules not Relaxed in Favor of Great Industries.* The doctrine that relaxes the ordinary rules governing the rights of riparian owners in favor of great industries engaged in the development of the natural



**RIPARIAN RIGHTS** — *Continued.*

resources of the country has never been adopted by the Court of Appeals of this state, and no public necessity exists therefor. *Strobel v. Kerr Salt Co.* 308

2. *General Rules — Co-relative Rights of Riparian Owners.* In the absence of modification by grant or prescription, a riparian owner is entitled to a reasonable use of the water flowing by his premises in a natural stream, as an incident to his ownership of the soil, and to have it transmitted to him without sensible alteration in quality or unreasonable diminution in quantity. While he does not own the running water, he has the right to a reasonable use of it as it passes by his land. As all other owners upon the same stream have the same right, the right of no one is absolute, but is qualified by the right of the others to have the stream substantially preserved in its natural size, flow and purity, and to protection against material diversion or pollution. This is the common right of all, which must not be interfered with by any. The use by each must, therefore, be consistent with the rights of the others, and the maxim of *sic utere tuo* observed by all. The rule of the ancient common law is still in force — *aqua currit et debet currere, ut currere solebat.* *Id.*

3. *Lawful Uses of Stream.* Consumption by watering cattle, temporary detention by dams in order to run machinery, irrigation when not out of proportion to the size of the stream, and some other familiar uses, although in fact a diversion of the water involving some loss, are not regarded as an unlawful diversion, but are allowed as a necessary incident to the use in order to effect the highest average benefit to all the riparian owners. As the enjoyment of each must be according to his opportunity and the upper owner has the first chance, the lower owners must submit to such loss as is caused by reasonable use. *Id.*

4. *Reasonable Use Depends upon Circumstances.* Surrounding circumstances, such as the size and velocity of the stream, the usage of the country, the extent of the injury, convenience in doing business and the indispensable public necessity of cities and villages for drainage, are also taken into consideration, so that a use which, under certain circumstances, is held reasonable, under different circumstances would be held unreasonable. It is also material, sometimes, to ascertain which party first erected his works and began to appropriate the water. *Id.*

5. *Unreasonable Use is a Question of Law.* The question of reasonable use is generally a question of fact, but whether the undisputed facts and the necessary inferences therefrom establish an unreasonable use is a question of law. *Id.*

6. *Facts Establishing Unreasonable Use.* When the diversion, or pollution, which is treated as a form of diversion, is caused by a new and extraordinary method of using the water, hitherto unknown to the state, and such method not only permanently diverts a large quantity of water from the stream, but also renders the rest so salt at times that cattle will not drink it unless forced to by necessity, fish are destroyed in great numbers, vegetation is killed and machinery rusted, such use as a matter of law is unreasonable and entitles the lower riparian owner to relief. *Id.*

7. *Power of Court of Equity to Restrain Unreasonable Use.* Where the natural and necessary result of the place selected and the method adopted by an upper riparian owner in the conduct of his business is to cause material injury to the property of an owner below, a court of equity will exercise its power to restrain on account of the inadequacy of the remedy at law and in order to prevent a multiplicity of suits. The lower riparian owners are entitled to a fair participation in the use of the water and their rights cannot be cut down by the convenience or necessity of the business of an upper riparian owner. *Id.*

**RIPARIAN RIGHTS** — *Continued.*

8. *Great Industries Located on Natural Streams not Permitted to Inflict Substantial Injury upon Lower Riparian Property.* While the courts will not overlook the needs of important manufacturing interests, nor hamper them for trifling causes, they will not permit substantial injury to neighboring property, with a small but long-established business, for the purpose of enabling a new and great industry to flourish. They will not change the law relating to the ownership and use of property in order to accommodate a great business enterprise. According to the old and familiar rule, every man must so use his own property as not to injure that of his neighbor, and the fact that he has invested much money and employs many men in carrying on a lawful and useful business upon his own land, does not change the rule, nor permit him to permanently prevent a material portion of the water of a natural stream from flowing over the land of a lower riparian owner, or to so pollute the rest of the stream as to render it unfit for ordinary use. *Id.*

9. *When Court of Equity will Enjoin Unreasonable Use of Natural Stream.* Where one riparian proprietor by his use causes a deterioration of the water of a natural stream, the fact that others are using it in the same manner instead of preventing relief may require it, and even if the damages are slight, where the act complained of is such that by its repetition or continuance it may become the foundation or evidence of an adverse right, a court of equity will interpose by injunction. *Id.*

10. *Parties — When Riparian Owners may Unite in Action to Restrain Unreasonable Use.* Different riparian owners of distinct parcels of riparian land, who have a common grievance for an injury of the same kind, inflicted at the same time and by the same acts, though the injury differs in degree as to each owner, may unite in a common action to enjoin a higher riparian owner from diverting or polluting the stream. *Id.*

11. *Permanent Injunction may be Refused Conditionally by a Court of Equity.* A court of equity may require, as a condition of withholding a permanent injunction restraining an upper riparian proprietor from diverting or polluting the waters of a natural stream by using it in a new or peculiar manner for the manufacture of salt, the construction of a reservoir on the upper sources of the stream to accumulate water when it is plentiful for use in time of scarcity, and thus neutralize the diminution caused by the manufacture of salt, and may also require on the like condition greater care in preventing the escape of salt water and salt substances into the stream, and thus prevent or minimize the pollution. *Id.*

Pollution of stream by village sewage. *Swart v. Village of Saratoga Springs* (Mem.). 609

**SALES.**

1. *Sale of Goods to be Shipped — Shipment Must be Made in Reasonable Time when No Time is Fixed Therefor — What Constitutes Reasonable Time — Burden of Proof.* Where a contract for the sale of goods to be shipped from a foreign port fixes no time for the shipment, it must be made in a reasonable time, and that depends upon the circumstances of the particular case, such at least as the parties may be supposed to have contemplated in a general way in making the contract, and the burden is upon the seller to show compliance in that particular in an action to recover damages for the buyer's refusal to accept and pay for the goods. *Eppens, Smith & Wiemann Co. v. Littlejohn.* 187

2. *Personal Inability to Take Advantage of Shipping Facilities not Available to Disprove or Excuse Delay in Shipment.* Where upon the trial of such an action it appears that it was expected by the defendant and impliedly agreed by plaintiff that it was in a situation to secure a shipment by the first sailing vessel leaving the port able to store and carry the goods properly; that the shipment was delayed nine months and ten days, which delay was characterized by plaintiff itself

**SALES — Continued.**

within five months from the execution of the contract as "altogether unreasonable" and by one of his witnesses as an "uncommonly long time;" that it was caused by a prejudice or discrimination against the plaintiff or its vendors at the foreign port, although every reasonable effort had been made to ship the goods and they were shipped at the first opportunity, the delay is unreasonable, having been caused, not by a lack of transportation facilities, but by plaintiff's personal inability to take advantage of them, and such personal disadvantage is not within the contemplation of the contract and is not available either to disprove unreasonable delay or to excuse it. *Id.*

8. *Appeal — Right of Appellant to Complain of the Testimony of his own Witnesses.* Where plaintiff's witnesses have testified in explanation of and as an excuse for the delay in shipment that it was caused through plaintiff's inability to procure vessels by reason of a prejudice or discrimination existing against it at the foreign port and theirs is the only testimony upon the subject, he cannot complain on appeal that their testimony has been accepted as true and insist that there is no evidence of such prejudice or discrimination because his witnesses had assumed its existence without stating the particular facts tending to show it. *Id.*

4. *When Waiver of Delay in Shipment is Question of Fact.* A question of fact to be answered by inferences from the circumstances is presented by plaintiff's claim that the defendants waived the delay in shipment by not objecting to it on or soon after it notified them, pursuant to the terms of the contract, of the name of the vessel upon which it intended to make the shipment, when it appears that it did not then notify them when the vessel would sail; one of them testifying that upon receiving the notice he supposed the vessel had sailed, although it did not in fact sail until some considerable time thereafter; and it further appears that the plaintiff, pursuant to the contract, notified the defendants of the marks of the goods, and that they repudiated the contract nearly two months before the vessel arrived, and it does not appear that they delayed giving the plaintiff notice of the repudiation. *Id.*

5. *When Receipt of Letter Refusing to Change Method of Shipment and Fixing Limit of Time therefor is a Question of Fact — Assent by Failure to Respond.* The question whether the plaintiff received a letter which was addressed to it by the defendants, refusing to grant a request preferred by plaintiff's agent, to accept steam transportation *via* another port instead of direct transportation by sailing vessel, and which letter contained in addition an extension of time for shipment to a date therein specified, is a question of fact, when the plaintiff, by its president, the day after the letter bears date, wrote to its agents at the port of shipment that the shipment must be by sail, as no other way would be satisfactory to the vendees; and when the plaintiff has received such letter and fails to respond to it, he will be deemed to have assented to defendants' understanding of the limit of reasonable time required by the contract, and will be bound by the date of shipment therein fixed. *Id.*

6. *Evidence — Admissibility of Statement Tending to Show Understanding of Parties as to Meaning of Contract.* A statement by plaintiff's duly authorized agent, when making the contract, that he had no doubt that the shipment could be made during specified months, may be considered by the jury in determining what was a reasonable time in which to make the shipment, since it would show about what the parties understood it to be, although it would not fix the exact time. *Id.*

7. *Rescission — Facts Insufficient to Establish Fraud.* The insolvency of a vendee, coupled with the fact that he had carried on business for many years upon capital obtained from a bank upon forged commercial paper, does not negative the inference of an honest intention upon his part to pay for goods purchased, and will not entitle the vendor to rescind the

**SALES — Continued.**

sale upon the ground of fraud and reclaim the goods from the bank, which has subsequently obtained possession of them under circumstances constituting it a *bona fide* purchaser. *Sinnott v. German Am. Bank.* 886

8. *Unlawful Use of Designation “& Co.” — Penal Code, § 363.* Where the vendee has no actual partner or partners, the use of the designation “& Co.” in the transaction of his business, in violation of section 363 of the Penal Code, making such use a misdemeanor, could have no operation in the case of an executed agreement. The statute is highly penal and should be strictly construed. *Id.*

**SCHENECTADY (CITY OF).**

1. *Expense of Repaving Street Intersections.* The amendment of section 59 of the charter of the city of Schenectady (L. 1890, ch. 294, as amd. by L. 1893, ch. 190), by omitting the provision that the cost and expense of repaving the street intersections should be borne by the city at large, had the effect of imposing the whole cost of repaving a street on the abutting lots. *Conde v. City of Schenectady.* 258

2. *Method of Paying Assessment.* Under section 61 of the charter of the city of Schenectady, the determination whether an assessment for repaving a street shall be payable in installments or not is, in the absence of request by the petitioners for the improvement, vested in the common council. *Id.*

**SERVICES.**

When indefiniteness of price therefor will preclude recovery.

See CONTRACT, 3.

**SESSION LAWS.**

1. 1813, *Ch. 50 — Judgment — Lien of, as against a Bona Fide Purchaser without Notice before Docket.* Under sections 1 and 3 of chapter 50 of 1 Revised Laws of 1813, no judgment affecting any lands, tenements, real estate or chattels real had any preference until the record thereof had been filed and docketed as against a *bona fide* purchaser of such real property for a valuable consideration, and a deed given by the judgment debtor for a consideration expressed therein upon the day judgment was entered, without proof that the judgment was entered first, or that the purchaser had actual or constructive notice thereof, is valid as against the judgment. *Sweetland v. Buell.* 541

2. 1836, *Ch. 239 — Mutual Fire Insurance Company — Cash Policyholders Entitled to Vote at Election of Directors.* Holders of policies in a mutual fire insurance company, organized under chapter 239 of the Laws of 1836, as amended by chapter 47 of the Laws of 1848, who have paid a certain definite sum of money in full for insurance therein, in lieu and in place of a premium note therefor, are as fully and effectively insured as those who have given a premium note for insurance and are members of the company and entitled to vote at any election of its directors equally with note policyholders. *Matter of Mutual F. Ins. Co.* 10

1848, *Ch. 47.* See par. 2, this title.

3. 1880, *Ch. 14 — Municipal Corporation — Power to Regulate Erection of Billboards.* The power conferred upon the city of Rochester by its charter “to license and regulate billposters \* \* \* and to prescribe the terms and conditions upon which any such license shall be granted \* \* \*” (L. 1880, ch. 14, § 40, subd. 21, as amd., L. 1894, ch. 28, § 9), authorizes an ordinance prohibiting the erection of billboards exceeding six feet in height, except with the permission of the common council, after notice in writing of the application for the permit, to the owners, occupants or agents of all houses and lots within a distance of 200 feet from where such billboard is to be erected. *City of Rochester v. West.* 510

**SESSION LAWS—Continued.**

4. 1888, *Ch. 583—New York City—Fire Department Fund for Benefit of Widows and Orphans.* A member of the fire department of the borough of Brooklyn, who is within the provision of law for the creation of an insurance fund for the benefit of widows and orphans of its members (L. 1888, ch. 583, tit. 13, § 15, as amd. L. 1889, ch. 153; L. 1897, ch. 378, § 791), may not, on retiring from its membership and becoming a pensioner, have his name taken from the list of subscribers to that fund, and the amount of his contribution, as prescribed by the statute, should be deducted from his monthly pension, notwithstanding his name is stricken from the list and he ceases to be a contributor. *Matter of Tobin.* 533

1889, *Ch. 153.* See par. 4, this title.

5. 1890, *Ch. 294—City of Schenectady—Expense of Repaving Street Intersections.* The amendment of section 59 of the charter of the city of Schenectady (L. 1890, ch. 294, as amd. by L. 1893, ch. 190), by omitting the provision that the cost and expense of repaving the street intersections should be borne by the city at large, had the effect of imposing the whole cost of repaving a street on the abutting lots. *Conde v. City of Schenectady.* 258

6. *Idem—Method of Paying Assessment.* Under section 61 of the charter of the city of Schenectady, the determination whether an assessment for repaving a street shall be payable in installments or not is, in the absence of request by the petitioners for the improvement, vested in the common council. *Id.*

7. 1890, *Ch. 565—Railroad Law—Mandamus to Compel Restoration of Highway under the Railroad Law—A Proceeding Independent of Remedy for Encroachment Given by Highway and Town Laws and may be Maintained by Private Citizen in the Name of the People.* Mandamus will lie at the instance of a private citizen in the name of the People of the state to compel a lessee railroad company, which has reconstructed a crossing in such manner as to encroach upon a highway, to perform the public duty imposed upon it by section 11 of the Railroad Law (L. 1890, ch. 565) of restoring the highway "to its former state or to such state as not to have its usefulness impaired," and the proceeding is entirely independent of the remedy given by the Highway Law (L. 1890, ch. 568) for the removal of encroachments upon a highway, and sections 15 and 105 relating to notice of, and directions for, their removal and providing, in connection with the Town Law (L. 1890, ch. 569, § 182), that the proceeding must be brought in the name of the town, have no application. *People ex rel. Bacon v. No. Central Ry. Co.* 289

8. *Idem—Change of Location and Method of Construction of Railroad Crossing—Necessity for Order of Supreme Court.* Where a railroad company without legal authority has changed its line thirty-five feet to the westward, has crossed the highway at a new point and has constructed a new bridge, the abutments of which encroach upon the highway, instead of being parallel with and on the lines thereof, as the abutments of the old bridge were, it must be treated as an original crossing, which can only be lawfully accomplished by complying with section 11 of the Railroad Law providing that no railroad corporation shall construct its road across, upon or along any highway in a town without an order of the Supreme Court of the district in which such highway is situated, after at least ten days' written notice of intention to make the application for such order shall have been given to the commissioner of highways of the town. *Id.*

9. *Idem—When Railroad Company may not Change Line of Highway Crossed by its Track.* The provision of section 11 of the Railroad Law, that "when an embankment or cutting shall make a change in the line of such highway \* \* \* desirable with a view to a more easy ascent or descent, it may construct such highway \* \* \* on such new line as

**SESSION LAWS — Continued.**

its directors may select, and may take additional lands therefor by condemnation if necessary," applies only where the existence of an embankment or cutting makes a change of grade in the highway desirable, and does not apply where the object is merely to change the highway, at a point where it is crossed by an overhead track, so that it shall approach the underpass formed by the abutments perpendicularly and not obliquely, and, therefore, obviate the necessity of changing the abutments so that they shall not encroach upon the highway; nor does the further provision, to the effect that where a railroad crosses a highway the company shall restore it "to its former state or to such a state as not to have unnecessarily impaired its usefulness," and the highway may be carried under or over the track, confer any power to change its line or to acquire additional lands. *Id.*

10. *Idem* — *Power of Court to Authorize Continuance of Abutments Encroaching upon Highway.* The court has no power in a proceeding by mandamus to compel a railroad company to restore a highway at the point of an overhead crossing to such condition as will not impair its usefulness, to make permanent an encroachment of stone abutments upon a highway, provided the route of the highway is changed by acquiring additional land, so that the traveler may pass in safety over a straight course between the abutments, where their construction in that manner was without an order of the Supreme Court, as required by section 11 of the Railroad Law, and was, therefore, illegal *ab initio*. *Id.*

1890, *Ch.* 568. See par. 7, this title.

1890, *Ch.* 569. See par. 7, this title.

11. 1892, *Ch.* 488 — *Game Law — Possession of Fish Inhibited Thereby During Close Season.* The prohibition against the possession of certain fish during the close season contained in the Fisheries, Game and Forest Law (L. 1892, ch. 488, §§ 110, 112, as amd. by L. 1896, ch. 531, and L. 1898, ch. 109) applies only to such fish as are taken from the waters of this state and not to those imported from a foreign country; and the mere possession of fish of the species inhibited, by any person within this state, during the close season, is not in itself a violation of the law, although it is *prima facie* evidence thereof and casts upon him the burden of proving facts showing his possession to be lawful. *People v. Buffalo Fish Co.* 93

12. *Idem* — *Game Law — Section 246 Applicable only to Criminal Offenses.* Section 246 of the Game Law (L. 1892, ch. 488), providing that any magistrate having criminal jurisdiction, on proof by affidavit that any of the provisions of that statute have been violated by any persons temporarily within his jurisdiction, but not residing there permanently, or by any person whose name and residence are unknown, shall issue his warrant for the arrest of such offender and cause him to be committed to bail to answer the charge against him, applies only to criminal offenses under the statute, and does not authorize the arrest of a person charged with its violation by trespassing and fishing upon a private park established thereunder where the statute imposes only exemplary damages in addition to actual damages for such violation and no provision thereof made such trespass criminal at the time of his arrest. *Stahl v. Roof.* 162

13. 1892, *Ch.* 688 — *Stock Corporation Law — Construction of § 30.* The provision of section 30 of the Stock Corporation Law (L. 1892, ch. 688) which declares that if the annual report required by the law is not made and filed, the directors shall jointly and severally be personally liable for all the debts of the corporation then existing, is remedial, and, if necessary, should be liberally and not narrowly construed so as to embrace the debts within the language of the act, however strictly it may be construed as to the acts of the directors constituting their alleged default, or as to the evidence of debt of the corporation; and corporate bonds secured by

**SESSION LAWS — Continued.**

a mortgage upon a corporation's real estate are within the meaning and intent as well as within the language of such provision. *Morgan v. Hedstrom*. 224

14. *Idem* — *Liability of Directors for Successive Failures to File Annual Report — Joinder of New Directors*. Successive defaults in making and filing reports by the same directors do not renew as to them the penalty already incurred under section 30, but when a new member comes into the board a new default makes him jointly and severally liable for the debts "then existing," that is, he becomes jointly liable with the old members of the new defaulting board; and a single action may be maintained against both the old and new directors if brought before the Statute of Limitations bars the liability of either. *Id.*

15. *Idem* — *Effect of the Participation as Director in Previous Defaults by the Vendor of Bonds*. That the vendor of corporate bonds was at the time of the sale a director of the corporation and was participating with the other directors in the default in filing the annual report, and, therefore, could not enforce the penalty prescribed by section 30 against his co-directors, does not prevent the purchaser of the bonds from enforcing the penalty on account of a subsequent default by them in which the vendor also participated. *Id.*

16. *Idem* — *Mistake of Date at which Directors Incurred Penalty*. A mistake by the plaintiff in an action to enforce the penalty prescribed by section 30 for failure of directors to file the annual report, in alleging the date at which the penalty was incurred, due to a mistake as to the date the law fixes, is not reversible error if within the true dates the plaintiff has shown his right to recover. *Id.*

1893, Ch. 190. See par. 5, this title.

1894, Ch. 28. See par. 3, this title.

1896, Ch. 531. See par. 11, this title.

17. 1896, Ch. 909 — *Election Law — Section 56 Directory not Mandatory*, The provision of the Election Law (L. 1896, ch. 909, § 56, as amd. L. 1898, ch. 335) that a final order of the court reviewing the determinations and acts of the officers with whom certificates of nomination are filed must be made on or before the last day fixed for filing certificates of nominations to fill vacancies, viz., fifteen days before election, is directory and not mandatory and where the court has acquired jurisdiction and a case has been submitted within the time required by the statute, its order will be effectual although made after the expiration of such time. *Matter of Hennessy*. 393

18. *Idem* — *Duty of the Courts to Render Speedy Decisions*. It is the duty of courts and judges entertaining proceedings under the statutes to speedily decide the questions presented to them so that the various steps required by officers may be taken in time to permit the carrying into execution its provisions. *Id.*

19. 1897, Ch. 378 — *New York City Charter — Justices Transferred to Municipal Court have no Power to Appoint Clerks Thereof for Full Term*. Justices of the inferior courts of the cities of New York and Brooklyn, in office January 1, 1898, who were transferred to the Municipal Court of the city of New York as justices thereof to serve out their unexpired terms, have no power to appoint clerks of that court for terms of six years conferred by the new charter (L. 1897, ch. 378, § 1373) upon justices "elected or appointed as hereinbefore provided," since the words "elected or appointed" refer only to justices to be elected or appointed after the charter went into effect. *Stuber v. Coler*. 22

See, also, par. 4, this title.

**SESSION LAWS — Continued.**

20. 1897, *Ch. 415 — Labor Law — Negligence — Fall of Scaffold — Master's Liability to Servant.* Where a scaffold provided by the master for a servant's use falls, and no other cause of the fall is ascertained except as inferred from the fall itself, the fall is *prima facie* evidence of the negligence of the master in an action by the servant to recover damages received in consequence thereof. *Stewart v. Ferguson.* 553

21. *Idem — Liability of Master under Labor Law.* Where the cause of the fall is otherwise ascertained, sections 18 and 19 of the Labor Law (L. 1897, ch. 415) enlarge the duty of the master, and extend it to responsibility for the safety of the scaffold itself, and thus for the want of care in the details of its construction. *Id.*

1898, *Ch. 109.* See par. 11, this title.

1898, *Ch. 335.* See pars. 17, 18, this title.

22. 1899, *Ch. 473 — Primary Election Law — Member of General Political Committee Cannot be Removed by Committee Itself.* A member of the general committee of a political party of a county, who has been duly elected under the provisions of the Primary Election Law (L. 1899, ch. 473), cannot be removed from office as a member of such committee by the committee itself, under any pretext whatever, since it is the manifest intent of the statute that the majority of the primary voters are entitled to select any representative they may desire upon such committee, who shall be responsible to those electing him, and only to them, for his conduct. *People ex rel. Coffey v. Democratic General Committee.* 335

**SET-OFF.**

*Separate Trial of Counterclaim also Constituting a Defense will not be Granted — Code of Civil Procedure, § 974.* Where the answer in an action on contract alleges as a defense and also by way of a counterclaim that the agreement was to pay a certain sum instead of that stated in the contract, and that defendant's signature was procured through fraud, and demands the reformation of the contract, a motion under section 974 of the Code of Civil Procedure that the equitable issue raised by the pleadings be first tried by the court is properly denied, since the matter alleged as a counterclaim, if proved, also constitutes a defense and relieves the defendant as fully as the allowance of the counterclaim, and the provisions of that section have no application, but were intended to provide for the mode of trial of an issue arising upon a counterclaim in which the facts alleged do not constitute a defense and are not available as such. *Bennett v. Edison El. Ll. Co.* 181

**SPECIAL TERM.**

Order distributing surplus in foreclosure proceedings.

See APPEAL, 3.

**STATUTES.**

Validity of — general rule.

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**SUPREME COURT.**

Has no power to authorize continuance of abutments encroaching upon highway.

See RAILROADS, 5.

**SURPLUS.**

Modification of decree distributing on foreclosure.

See APPEAL, 3.

**SURROGATE.**

Unanimous affirmance of decree of, by Appellate Division.

See APPEAL, 5.



**SURVIVAL.**

Of action for negligence by sole next of kin.

See ABATEMENT.

**TAXPAYER'S ACTION.**

1. *New York City — Unauthorized Offer of Judgment by Corporation Counsel.* The corporation counsel of the city of New York has no power, either by virtue of his retainer or under the charter (L. 1897, ch. 378, § 255), to make an offer of judgment in an action against the city, and his affidavit under section 740 of the Code of Civil Procedure that he is duly authorized to make it in behalf of the party, is "an illegal official act" within the clear wording of the statute (L. 1892, ch. 301), authorizing a taxpayer to bring an action "to prevent any illegal official act on the part of any officer of any \* \* \* municipal corporation in the state," and an action may be maintained thereunder to restrain the judgment creditors from collecting and the comptroller from paying a judgment entered upon such offer. *Bush v. O'Brien.* 205

2. *Taxpayer Cannot Interpose and Appeal in Action against the City.* A taxpayer has no right to interpose and appeal in an action in which a person has obtained a judgment against a city on a claim for damages. *Id.*

3. *Taxpayer's Action to Restrain Illegal Official Act — Proof Required.* In order to maintain a taxpayer's action to restrain the collection and payment of a judgment entered against the city on an offer of judgment by the corporation counsel, upon the ground that his affidavit that he was duly authorized to make such offer was an illegal official act, it is not necessary for the plaintiff to show that the city was not justly indebted in the amount stated in the judgment, since the action is brought under the provision of the statute authorizing a taxpayer's action to prevent an "illegal official act" and not under the provision authorizing an action "to prevent waste." *Id.*

**TENANTS IN COMMON.**

1. *Must Account to Cotenants for Rock Quarried and Sold.* A tenant in common in possession of land, who, without the consent or authority of his cotenants, quarries rock therefrom and crushes and sells the same and converts the proceeds to his own use, must account to his cotenants for the value of the rock taken from the premises, since such rock is a part of the freehold, and, to the extent it is taken, operates as a diminution of the estate. *Cosgriff v. Dewey.* 1

2. *Rule that Deed to one Cotenant Inures to Equal Benefit of the Other — When not Applicable.* The rule that the purchase of an outstanding title by one of two tenants in common of real property inures to the benefit of his cotenant as well as himself does not apply where the deed claimed to create the cotenancy did not convey any title because the grantor had previously parted with all his title, since in that case the relation of tenants in common does not exist. *Sweetland v. Buell.* 541

3. *Adverse Possession — Ouster — Conveyance of Entire Estate by one Tenant in Common.* If one tenant in common of real property assumes to sell and convey the entire estate, apparently doing so, and his grantee assumes to take it and goes into possession, and he and his grantees hold the same for more than forty years, the possession thus taken and held may be treated as an ouster of the cotenant, and constitutes adverse possession. *Id.*

**TIME.**

What constitutes reasonable time for performance of contract when no time fixed.

See SALES, 1.

**TRIAL.**

1. *Separate Trial of Counterclaim also Constituting a Defense will not be Granted*—Code of Civ. Pro. § 974. Where the answer in an action on contract alleges as a defense and also by way of a counterclaim that the agreement was to pay a certain sum instead of that stated in the contract, and that defendant's signature was procured through fraud, and demands the reformation of the contract, a motion under section 974 of the Code of Civil Procedure that the equitable issue raised by the pleadings be first tried by the court is properly denied, since the matter alleged as a counterclaim, if proved, also constitutes a defense and relieves the defendant as fully as the allowance of the counterclaim, and the provisions of that section have no application, but were intended to provide for the mode of trial of an issue arising upon a counterclaim in which the facts alleged do not constitute a defense and are not available as such. *Bennett v. Edison El. Il. Co.* 131

2. *Refusal of Request to Charge.* Where a stockholder of a corporation, who is also a creditor, signs a consent that a sale of its property be made, and receives in lieu thereof from the party benefited by such consent his oral promise to pay from the proceeds of such sale the sum due to him as a creditor, the question of consideration to support the agreement is not solely dependent upon such consent as a stockholder, and upon the trial of an action to recover such sum, a request to charge that it was not necessary that every stockholder should give his consent either in writing or orally in order to enable the trustees to make a valid sale of the property of the corporation is properly refused. *Lamkin v. Palmer.* 201

3. *Declarations by District Attorney as to the Law of the Case—When not Cause for Reversal.* The misconduct of the district attorney in assuming to state the law upon the question of premeditation and deliberation, and in persisting in making such statements after the court had instructed him not to continue the discussion, is not sufficient cause for reversal of a conviction, where the court distinctly and plainly instructed the jury upon the question of premeditation and deliberation, and also instructed it to disregard any matter that had been stated as to the law, or what the law should be, and any statements made in regard to any opinions or decisions of the courts, except such as should be made by the trial judge. *People v. Priori.* 459

4. *Improper Comments by District Attorney—When Cured.* Statements by the district attorney in his address to the jury as to the law of defendant's native country, to the effect that the crime of murder was less seriously punished in that country, are rendered harmless, and should be disregarded by the Court of Appeals, where the district attorney withdrew his remarks on that subject, when the defendant objected to them, and the court expressly directed the jury to disregard them. *Id.*

5. *Commenting on Defendant's Failure to Testify—When Cured.* Any error resulting from comments by the district attorney, upon the failure of defendant in a murder trial to testify in his own behalf, is cured where the trial court, at the defendant's request, calls the attention of the jury to the provisions of section 393 of the Code of Criminal Procedure, and charges them that while the defendant in all cases may testify in his own behalf, still, his neglect or refusal to do so does not create any presumption against him. *Id.*

6. *Request for Direction of Verdict—Waiver of Right to go to Jury.* Defendants who stand upon their motion for the direction of a verdict in their favor and upon their exceptions to the direction of a verdict for plaintiff and to the refusal to direct a verdict in their favor, without requesting the submission of any specified questions of fact, thereby submit them to the court, and waive their right to go to the jury. *Sweetland v. Buell.* 541

**TRUSTS.**

1. *Abolition of Naked Trust in Real Property by Real Property Law.* The grantee in a deed of absolute conveyance of real property, who executes a cotemporaneous declaration of trust in favor of a third person, his heirs, administrators and assigns, declaring that he holds the property in trust for such person for his proper support and maintenance, the rents and profits to be paid to him, and promising upon his demand or that of his heirs, executors, administrators or assigns, to convey the premises to him or them by a good quitclaim deed warranting against all claiming under him (the person declaring the trust), takes a mere naked trust which is abolished by the Real Property Law (L. 1896, ch. 547, §§ 72, 73, 129); and as trustee no legal or equitable estate vests in him, but the fee vests in the person in whose favor the trust is declared. *Wendt v. Walsh.* 154

2. *Appeal — Modification of Decree Distributing Surplus in Foreclosure Proceedings.* The Court of Appeals may, upon appeal from an order of the Appellate Division reversing an order of the Special Term which confirmed the report of a referee in proceedings to distribute the surplus arising upon the foreclosure of a mortgage, modify the order by directing the payment first out of the surplus of an unpaid judgment with interest thereon, against a decedent in whose favor a trust had been declared by a grantee of the premises, but who by virtue of sections 72, 73 and 129 of the Real Property Law took the fee, the mere naked trust being abolished by the statute, although the referee's findings of fact did not include the claim preferred by the judgment creditor, owing to the fact that the referee held that the decedent never had title to the property, and although the order of the Appellate Division distributed the surplus among the children of the decedent, ignoring the judgment creditor's claim. *Id.*

3. *Appeal — Unanimous Affirmance of Surrogate's Decree by Appellate Division.* Where a referee acquits testamentary trustees of bad faith in making an investment, but holds them liable to the *cestuis que trust* on the ground that the character of the investment was illegal, and his report is confirmed by the surrogate, and the latter's decree is unanimously affirmed by the Appellate Division, which, while it holds that under the will the trustees were not limited to ordinary trust investments, was of the opinion that the investment was speculative and hazardous and, therefore, improper, the Court of Appeals must affirm the judgment, and cannot look into the evidence to see how speculative or unreasonable the investment was. *Matter of Hall.* 196

4. *Testamentary Trustees — Liability for Loss from Investments.* Trustees under a will empowering them to invest the funds of the trust "in any security, real or personal, which they may deem for the benefit of my estate and calculated to carry out the intention of this, my last will," are given a discretion as to the character of investments they may make, and are not limited to the investments required by a court of equity, in the absence of any direction from the testator; but they must exercise a sound discretion as well as good faith and honest judgment, and, in the absence of words in the will giving greater authority, are not authorized to invest the fund in new speculative or hazardous ventures, although they acted in good faith, and they will be held liable to the non-assenting *cestuis que trust* for losses resulting from such an investment. *Id.*

5. *Estoppel of Assenting Cestuis Que Trust — Modification on Appeal of Decree Protecting Trustees.* Equitable life tenants of a trust fund who consent to such an investment are estopped from questioning its propriety, and when, in certain contingencies, they may be entitled to share in the principal of the fund, a surrogate's decree which authorizes the trustees to retain the shares of life tenants who consented to the investment, in the income produced by the sum which the trustees are directed by the decree to pay into the fund on account of the loss resulting from the investment, must be modified on appeal so as to provide

**TRUSTS** — *Continued.*

that in case any beneficiary who has assented to the investment shall become entitled to any part of the principal of the fund paid by the trustees, then the trustees may retain such part. *Id.*

For poor persons of parish.

*See* WILL, 2.

**UNANIMOUS AFFIRMANCE.**

Findings of fact cannot be questioned as against or without evidence.

*See* APPEAL, 2.

Of surrogate's decree by Appellate Division.

*See* APPEAL, 5.

By Appellate Division as to consideration to sustain a contract.

*See* APPEAL, 6.

Review of findings of fact.

*See* APPEAL, 22.

**VARIANCE.**

Between indictment and proof.

*See* CRIMES, 5.

**VERDICT.**

Request for direction of.

*See* TRIAL, 6.

**WAIVER.**

Of attorney's lien.

*See* ATTORNEY AND CLIENT, 2.

Of defect in parties.

*See* ASSIGNMENT, 2; RAILROADS, 2.

Of right to go to jury.

*See* TRIAL, 6.

**WATERCOURSES.**

*Diversion of Sub-surface Waters by Municipal Water Works.* A municipal corporation which, by the operation of a water system consisting of wells and pumps on its own land, taps the sub-surface water stored in the land of an adjacent owner and in all the contiguous territory, leads it to its own land and by merchandising it prevents its return, whereby the value of the land of such owner is impaired for agricultural purposes, is liable to him in trespass for the damages occasioned thereby. *Forbell v. City of New York.* 523

**WATER WORKS.**

Diversion of sub-surface waters by municipal water works.

*See* WATERCOURSES.

**WILL.**

1. *Construction of Will — Vested or Contingent Remainder.* Under a will which bequeaths the residue of the estate to the executors in trust, commands them to sell the real estate, convert the personalty into cash and invest the proceeds, directs that the trust term shall be measured by the life of the testator's wife, to whom the executors are to pay an annuity, and provides that "upon the decease of my said wife I order and direct that my estate be divided" equally between his brothers and sisters and niece, each to take an equal share, except that from the share of one of the brothers a certain sum shall be deducted "which sum I do give and

**WILL**—*Continued.*

bequeath to be paid to my nephew," and further provides that the share of such brother and another brother shall be held in trust during their lives, the income to be paid to them and the principal to their issue in equal shares after their death, and further provides that if any of the brothers and sisters or the niece shall die before the testator's wife, leaving lawful issue him or her surviving, the share of one so dying shall be paid over to his or her issue in equal shares, and if no issue survives, then the share is to be divided among the survivors and the lawful issue of any of one or more of them who shall have died leaving lawful issue surviving, each one of the said survivors taking one equal share thereof, and the lawful issue of any one deceased to take the share of the parents, if one, solely, if more than one, jointly and equally, the brothers, sisters and niece of the testator take contingent remainders only, and not vested remainders subject to be divested as to any one of them by his or her death prior to the decease of the testator's wife; and in the event of the death of one of them before the widow, those of his or her children who survive the widow take to the exclusion of an assignee of a child who died unmarried and leaving no issue after the death of the parent but during the lifetime of the widow; since aside from the direction to the executors or trustees to divide and distribute the estate upon the death of the widow, there are no words importing a gift, and where the only gift is found in a direction to divide, or pay, at a future time, the gift is future not immediate; contingent and not vested. *Matter of Crane.* 71

2. *Trust for Poor Persons of Parish—Competency of Trustees.* A bequest in trust "to the Selectmen, or other municipal authorities of the East Parish of my native town Barnstable, in the county of Barnstable and State of Massachusetts, or their successors forever, by what name soever such municipal authorities may at any time be known," to appropriate the income for the relief of persons of such parish in reduced circumstances, which trust, under the laws of Massachusetts, is valid so far as its purpose and beneficiaries are concerned, does not fail for want of competent trustees, notwithstanding that by the law of Massachusetts the town or its municipal authorities as such would not be competent trustees, since there is no appointment of the officers in their official capacity to the position of trustees, nor any gift to the town, but the trustees appointed are private citizens and are to act as such. *Matter of Sturgis.* 485

Testamentary trustees — liability for loss from investments.

See TRUSTS, 4.

**WITNESS.**

1. *Admissibility of Evidence Tending to Contradict or Impeach.* Where a witness upon an issue whether an assignment to his nominee of a sheriff's certificate of redemption is a forgery, testifies that he furnished the money to the assignor to make the redemption, and subsequently paid the judgment upon which he redeemed, evidence that theretofore, in proceedings supplementary to execution against him, he had testified that the property in question was not held in trust for him, and that he did not know the assignor, is admissible to contradict or impeach his testimony at the trial, since, if true, it furnished a reasonable basis for the inference that the assignment was genuine. *Boyd v. Boyd.* 234

2. *Duty of Court to Sustain Privilege of Witness.* Where, under the circumstances, the trial court is justified in informing a witness called by the defendant of his constitutional privilege to decline to answer any question that would tend to incriminate or degrade him, and it is manifest that he personally declined to answer upon such grounds, it is its duty to sustain his privilege, if the evidence on his examination as a witness would either tend to incriminate him or disclose a link in the chain of testimony which might convict him of crime, and he is not required to explain how

**WITNESS — Continued.**

he might be incriminated by the answer; and before the defendant can claim its ruling to be erroneous, he must at least show such facts as will render it clear that an answer to the question propounded would not, incriminate or disgrace the witness. *People v. Priori*. 459

8. *Appeal — When Error in Sustaining Witness' Claim of Privilege not Prejudicial.* Sustaining the claim of privilege, interposed by a witness brought into court from prison, to a question asked him by defendant in a murder trial, as to whether he heard a witness for the state say to defendant while in the prison that he knew nothing about the case, even if error, is not ground for reversing a conviction where the witness for the state had admitted that he made such a statement to the defendant and that fact is undisputed. *Id.*

Right of appellant to complain of testimony of his own witnesses.

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